IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-76-185

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION, *et al.*,
*Petitioners*,

v.

JAMES M. NAMEN, *et al.*, AND THE CITY OF POLSON, MONTANA,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, and Harold W. Mitchell, Jr., Chairman of the Tribal Council, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 534 F.2d 1376 (1976) and is reproduced as Appendix A. The opinion of the United States District Court for the District of

Montana is reported at 380 F.Supp. 452 (1974) and is reproduced as Appendix B. The partial summary judgment of the district court issued in connection with its opinion is reproduced as Appendix C.

## JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Whether reservation lands held in trust by the United States for an Indian tribe can be used by a non-Indian for wharves, docks, breakwaters, and other structures without the consent of the tribe or the Secretary of the Interior and without express congressional authorization.

## TREATIES AND STATUTES INVOLVED

The following treaty and statutes are reproduced as appendices.

1. Treaty of Hell Gate, July 16, 1855, 12 Stat. 975 (App. D).
2. General Allotment Act, Act of February 8, 1887, 24 Stat. 388 (App. E).
3. Act of April 23, 1904, 33 Stat. 302 (App. F).

## STATEMENT OF THE CASE

In 1805, when Lewis and Clark came to what is now northwest Montana, they found the Salish, Kootenai, and Upper Pend d'Oreille Indians occupying a vast area of land. The Indians had lived there from time immemorial and they continued to do so until by the Treaty of Hell



Gate [1] they ceded to the United States all of their aboriginal homelands, save their present reservation. It is on the reservation, excepted from the cession by that Treaty,[2] that petitioners, descendants of those Indians, now live.[3]

In the Treaty it had been provided that the Indians would have exclusive use and occupancy of the reservation,[4] which included the south half of Flathead Lake. Congress, by the Act of April 23, 1904, 33 Stat. 302 (App. F), allotted portions of the reservation to tribal members, but title to the south half of the Lake, including the bed and banks, continued to be held in trust by the United States. *Montana Power Co.* v. *Rochester*, 127 F.2d 189, 191 (9th Cir. 1942).

One Antoine Morais was allotted lands within the reservation in 1908. This allotment was adjacent to the south half of the Lake. The Namen respondents are fee owners of portions of the former Morais allotment. Respondent James M. Namen operates a business on these lands and maintains buildings and structures which extend beyond the high water mark of the Lake and encroach on its bed and banks.[5] In the spring of 1973

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[1] Treaty of July 16, 1855, 12 Stat. 975 (App. D).

[2] The reservation was established pursuant to Article II of the Treaty. 12 Stat. at 975-976 (App. D at 34a-36a).

[3] Petitioner Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana ("the Tribes"), is a confederation of American Indian tribes organized pursuant to the provisions of the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, with a governing body, the Tribal Council, duly recognized by the Secretary of the Interior. Petitioner Harold W. Mitchell, Jr., is an enrolled member of the Tribes, Chairman of the Tribal Council, and a resident of the reservation.

[4] Article II, 12 Stat. at 976 (App. D at 35a), declares: ". . . Nor shall any white man . . . be permitted to reside upon the . . . reservation without permission of the confederated tribes. . ."

[5] Among the structures which extend beyond the high water mark are wharves, piers, a storage shed, and a breakwater.

respondents commenced constructing a breakwater.[6] Representatives of the Tribes and the Bureau of Indian Affairs informed respondents that the breakwater under construction constituted a trespass on the Tribes' property and it and the other structures would have to be removed. Respondents refused and petitioners, on August 6, 1973, filed an action in the United States District Court for the District of Montana [7] seeking a declaration that respondents were in trespass upon tribal land, to the extent that their structures extended beyond the high water mark, and seeking to enjoin that trespass.[8]

The parties filed cross-motions for summary judgment. The City of Polson, located at the southern end of the Lake, within the reservation, intervened as a defendant.[9]

The district court granted defendants' motion and denied plaintiffs', holding:

(a) That title and ownership of the bed and banks of the south half of Flathead Lake are held by the United

[6] The breakwater extends for some distance into the Lake below the high water mark. The width of the breakwater, at water line, is approximately 16 feet. The breakwater is in the shape of the letter "L", enclosing a portion of the Lake and therefore the Tribes' reservation, to respondents' private use.

[7] Petitioners filed their complaint pursuant to 28 U.S.C. § 1362 and thereafter requested the United States, as their trustee, to intervene in the lawsuit. The United States did not intervene before the district court but did file a *amicus* brief with the Court of Appeals, supporting the position of the Tribes and urging reversal of the district court decision.

[8] ". . . The intent of the Tribes in this lawsuit is to establish ownership and by lease and regulations to ensure that the Tribes are compensated fairly for the use of their property and that the use of the Lake is in accordance with sound conservation and ecological considerations in furtherance of the interests of individuals residing on the Reservation. . . ." Opening brief of Confederated Tribes filed with Court of Appeals, note 92, p. 59.

[9] The City of Polson asserted it is successor in interest to various allotments riparian to the Lake.



States in trust for the Tribes and state law does not apply to determine if a riparian owner has any rights extending below the high water mark. (380 F.Supp. at 461; App. B at 17a).

(b) That riparian rights of access and wharfage to the south half of Flathead Lake could not be implied from the provisions of the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975 (App. D), or the Treaty of the Upper Missouri, October 17, 1855, 11 Stat. 657 (380 F.Supp. at 458-459; App. B 10a-13a).

(c) That the General Allotment Act [10] and other federal statutes which provided specifically for the allotment of lands within the Flathead Reservation [11] did not grant riparian rights of access and wharfage to owners of land riparian to the south half of Flathead Lake (380 F.Supp. at 459-461; App. B 13a-17a).

Petitioners concurred with the above, but the trial court went on to hold:

(d) That federal common law principles governing riparian rights establish that Congress, although it did not so express itself, intended that when tribal lands adjacent to Flathead Lake were allotted the tribal member, in addition to his allotment, would receive riparian rights in the unallotted tribal estate, which rights attached to the allotted land and survived cessation of Indian ownership (380 F.Supp. at 461-466; App. B 17a-29a).

(e) That the Namens, successors in interest to the allotment, are entitled as a matter of law not only to access to the Lake [12] but also to maintain structures be-

[10] Act of February 8, 1887, 24 Stat. 388 (App. E).

[11] Act of April 23, 1904, 33 Stat. 302 (App. F).

[12] Access to the former Morais allotment is by U.S. Highway 93, which fronts it.

low the high water mark of the Lake, without the consent of the Tribes or their trustee, the United States.

On appeal, a panel of the Court of Appeals for the Ninth Circuit adopted *per curiam* the opinion of the district court (534 F.2d at 1377; App. A 1a-3a). Consequently, it is, in effect, the opinion (380 F.2d at 452; App. B) and the partial summary judgment (App. C) of the district court for which review is sought.

## REASONS FOR GRANTING THE WRIT

The decisions of this Court relating to Indian property have been characterized from the beginning by clear and consistent holdings absolutely protecting the dwindling land base of tribes, save where there has been clear congressional action removing the lands in question from Indain ownership. The integrity of this rule has now been challenged by the court below. To the best of our knowledge, for the first time in the history of the United States, the decision below allows an adjoining non-Indian owner to encumber the title of, and actually physically occupy, federally owned trust lands. The court below achieved this unprecedented result without finding the clear congressional authority required by this Court in other cases. Rather, the court below found applicable by mere implication a common law rule of wharfage never before applied to Indian reservations, so as to remove from the Tribes the right to occupy and regulate their property. Further, to obtain this result, the court interpreted treaties, statutes, and documents against the Indians, in violation of the well-settled rules of this Court that treaties and statutes must be construed in favor of Indian tribes.

The decision, therefore, constitutes a significant precedent which, if uncorrected by this Court, will stand for the granting away of tribal trust property and the impairment of Indian treaty rights by implication, rather



than express congressional authorization, and will impair significantly the property and treaty rights of numerous Indian tribes [13] and the responsibilities of the United States as trustee of those property and treaty rights.[14]

### I.

In *Worchester* v. *Georgia*, 31 U.S. 515, 582 (1832), the rule of construction for treaties involving Indians was established:

> "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered or used only in the latter sense."

This principle, applicable also to statutes,[15] has been followed faithfully to the present, most recently in *Bryan* v. *Itasca County*, —— U.S. ——, 96 S.Ct. 2102 (1976).

The court below, however, violated this "eminently sound and vital canon" [16] and construed the federal statutes involved as granting by implication to some

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[13] In 1974 the United States held 40,772,000 acres of tribal land in trust for various Indian tribes and 10,243,000 acres of allotted land in trust for individuals, *Statistical Abstract of the United States*, 1975, U.S. Department of Commerce, table #342, p. 207.

[14] The interest of the United States, as trustee of the land and property rights involved in this case, was expressed in its *amicus* brief filed with the court of appeals. "This case raises an important question with respect to Indian affairs, which may affect other Indian controversies which may recur in this and other areas of the United States."

[15] ". . . [S]tatutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918), cited in *Bryan* v. *Itasca County*, —— U.S. ——, 96 S.Ct. 2102, 2113 (1976).

[16] *Northern Cheyenne Tribe* v. *Hollowbreast*, —— U.S. ——, 96 S.Ct. 1793, 1797 (1976).

allottees, but not to all, interests in tribal lands that could be exercised to the detriment of the treaty rights of all other tribal members, whether allotted or not.[17] The court, while reciting the unchallenged rules of construction, contradicted them because, in the court's words, "To grant the relief in light of the factual and legal consideration . . . would be a grevious injustice to the defendants and others in a similar position." [18]

The decision of the court, unfortunately, does more than an injustice to your Indian petitioners, based on the court's perception of an "injustice" to non-Indians. There are, within the jurisdiction of the district court below, seven Indian reservations,[19] and 1,947,000 acres of land held in trust by the United States for the tribes of those reservations, and 3,210,000 acres held in trust for individual Indians,[20] while within the overall jurisdiction of the Ninth Circuit, there are 153 Indian reservations [21] and 26,084,000 acres of tribal trust land and

[17] There is a sharp distinction between tribal property which is held in common and property held by an allottee. *Northern Cheyenne Tribe* v. *Hollowbreast, supra; Gritts* v. *Fisher*, 224 U.S. 640 (1912); *Whitefoot* v. *United States*, 155 Ct. Cl. 127 (1961); *St. Marie* v. *United States*, 108 F.2d 876 (9th Cir. 1940). As long as land remains tribal in character, an individual Indian has no vested rights, as against the tribe, to any specific part of the tribal property. *Northern Cheyenne Tribe* v. *Hollowbreast, supra.* Tribal property is controlled by the tribe and is used for the benefit of all.

Allotment of reservation lands has been prohibited since the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*

[18] 380 F.Supp. at 466 (App. B at 28a-29a), recited by the Court of Appeals in its *per curiam* affirmance 534 F.2d at 1377 (App. A at 3a).

[19] Information compiled from *Federal and State Indian Reservations and Indian Trust Areas*, U.S. Department of Commerce, GPO 1974.

[20] *Statistical Abstract of the United States*, 1975, U.S. Department of Commerce, Table #342, p. 207.

[21] See footnote 19, *supra.*



4,671,000 acres of individual trust land.[22]

For the other two circuits that cover the rest of the major Indian holdings, the Eighth and the Tenth, there is a total of 90 reservations [23] with 14,448,000 acres of tribal trust land, and 7,481,000 acres of individual trust land.[24] Therefore, any decision of the Ninth Circuit on the statutory construction of acts of Congress affecting allotments and tribal lands and treaty rights is of extreme significance and the deviant standard adopted by the court below, where the construction of a statute is based on a balancing of "equities" between Indians and non-Indians, cannot be permitted to stand.

## II.

The Morais allotment was granted pursuant to Section 2 of the Act of April 23, 1904, which opened the Reservation to non-Indian settlement. Section 2 provided:

> "That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights . . . under the provisions of the allotments laws of the United States." (33 Stat. 302 at 303; App. E at 50a).

The "allotment laws of the United States" referred to in Section 2 of the 1904 Act was the General Allotment Act,[25] which provided for the allotment of tribal lands "advantageous for agricultural and grazing purposes." Other portions of tribal land were to be sold. Section 16 of the 1904 Act stated that the United States was

[22] See footnote 20, *supra.*

[23] See footnote 19, *supra.*

[24] See footnote 20, *supra.*

[25] Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. § 331, *et seq.* (App. F).

rights in other tribal property that could be exercised to frustrate guaranteed treaty fishing rights.[27]

It was against this background that the court below found by implication that Congress intended allotments adjacent to Flathead Lake to carry with them federal common law riparian rights in the adjacent tribal land.

In reaching this conclusion, the court below violated the one cardinal rule of construction adopted by this Court in Indian cases—that treaties and statutes must be interpreted in favor of the Indians.

Allotment acts diminish the tribal estate and should be construed narrowly. The court below, however, construed the statute against the Tribes, by holding that the Morais allotment, by implication, carried with it riparian rights, and thus diminished the tribal estate further, contrary to the rule that statutes "passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries* v. *United States, supra,* at 89. *Cf. Northern Cheyenne Tribe* v. *Hollowbreast, supra.*

The court also violated the canon that statutes "must be construed not according to their technical meaning but 'in the sense in which they would naturally be understood by the Indians' ",[26] for certainly the Indians were unaware of the common law doctrine of riparian rights and certainly none of them can be presumed to have understood that a statute allotting Antoine Morais and some other individual members only certain rights in tribal property, also granted those members additional

[26] *Carpenter* v. *Shaw,* 280 U.S. at 367, quoting from *Jones* v. *Meehan,* 175 U.S. 1, 11 (1899).



rights in other tribal property that could be exercised to frustrate guaranteed treaty fishing rights.[27]

## III.

The opinion of the court below is an exceedingly more dangerous precedent to Indian land holdings and treaty rights than may appear at first blush because the court determined the scope of the Morais allotment not by construing the 1904 Act that granted that allotment, but by relying on Acts subsequent thereto that affected neither the allotment nor trust provisions of the 1904 Act.[28]

The court did this to avoid what it saw as a "grievous injustice" to the non-Indians who inhabit the reservation and own former allotments or "villa sites." Simply stated, had the court below followed the rules of construction laid down by this Court, the decision would have been to the contrary. Those rules, however, gave way here before non-Indian interests.[29]

[27] In *United States* v. *Winans,* 198 U.S. 371 (1905), non-Indians received fee patents absolute for land riparian to the Columbia River, away from the Indian reservation, but embracing traditional Indian fishing spots. The non-Indians were precluded from excluding the Indians from the land, by virtue of the Indians' treaty fishing rights. Here a non-Indian, successor to an allottee, is permitted to exclude the Indians not only from his land but from the Indians' own land.

[28] The court relied in the main on the Act of April 12, 1910, 36 Stat. 296, relating to "villa sites" which are not riparian to the Lake and which were not before the court. 380 F.Supp. at 466 (App. B at 28a). In relying on subsequent acts to determine the intent of Congress in 1904, the court below violated another established canon of construction, that the meaning of an enactment affecting Indian lands may not be altered by a subsequent declared intention of Congress, *Choate* v. *Trapp,* 224 U.S. 665, 667 (1912).

[29] It is obvious from the statement of the trial court, repeated by the appellate court, that the construction was neither for the benefit of the Tribes nor of the allottee—but for his non-Indian successor. The construction given was not necessary from an allottee's point of view, since as a tribal member he could use tribal lands and waters, subject to tribal control.

The court, in basing its construction of the 1904 Act on a balancing of the "equities" (the expenditure of funds over a period of years by non-Indians in the development of their riparian lands against a failure of the Tribes or their trustee to assert tribal title), accepted as the basis for its decision arguments rejected as early as *United States* v. *Winans*, 198 U.S. 371 (1905), and *Winters* v. *United States*, 207 U.S. 564 (1908), and as recently as *Cappaert* v. *United States*, —— U.S. ——, 96 S.Ct. 2062 (1976). Construction of Indian statutes and treaties, however, does not involve a balancing of equities. As this Court said most recently in connection with rights akin to those held by the Tribes:

> "Nevada argues that the cases establishing the doctrine of federal reserved water rights articulate an equitable doctrine called for a balancing of competing interests. However, an examination of those cases shows they do not analyze the doctrine in terms of a balancing test. For example, in *Winters* v. *United States*, *supra*, the Court did not mention the use made of the water by the upstream landowners in sustaining an injunction barring their diversions of the water. The 'Statement of the Case' in *Winters* notes that the upstream users were homesteaders who had invested heavily in dams to divert the water to irrigate their land, not an unimportant interest. The Court held that when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation.'"—*Cappaert* v. *United States*, —— U.S. ——, 96 S.Ct. at 2070.

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"[4] Nevada is asking, in effect, that the Court overrule *Arizona* v. *California*, 373 U.S. 546 . . . (1963) and *United States* v. *District Court for the County of Eagle*, 401 U.S. 520 . . . (1971), to the extent that they hold that the implied reservation doctrine applies to all federal enclaves since in so holding those cases did not balance the 'competing equities.' Nevada's Brief, at 15. However, since balancing the equities is not the test, those cases need not be disturbed."



It is precisely so here, where the rights reserved by the Tribes and guaranteed by the United States were within the defined confines of the reservation. To allow the lower court's rule of construction to remain the law will subject long-established Indian land holdings and treaty rights to judicial diminishment, based on a court's feelings concerning modern-day equities.[30] This is a dangerous, unacceptable precedent not only with regard to Indian land holdings and treaty rights, but also with regard to the interests of the United States. *Cf. Cappaert* v. *United States*, *supra*.

## IV.

The opinion of the court below conflicts directly with the decision of this Court in *United States* v. *Winans*, 198 U.S. 371 (1905). In *Winans*, the Yakima Indians, by their treaty of cession,[31] "secured" to themselves in land ceded, the right to take fish in all of their usual and accustomed places, in common with the citizens of the territory. Some of these "usual and accustomed" places were on the banks of the Columbia River. Patents absolute in form were issued to non-Indians for the land

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[30] The district court, in holding against the Tribes, in effect accuses them and the federal government of standing by, for half a century, with full knowledge of and without objection to the development by riparian owners of the south half of Flathead Lake (380 F.Supp. at 466; App. B at 28a-29a). The federal government, of course, does not have to bring a lawsuit on behalf of an Indian tribe unless it wishes to do so. *Pyramid Lake Paiute Tribe* v. *Morton*, 499 F.2d 1095, 1097 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962. *Siniscal* v. *United States*, 208 F.2d 406 (9th Cir. 1953), *cert. denied*, 348 U.S. 818 (1954); see *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365 (1968). Indian tribes lacked the authority to sue unless they could prove the amount in controversy exceeded $10,000, until the Act of October 10, 1966, 80 Stat. 880, 28 U.S.C. § 1362. See *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974). The observations and feelings of the courts below are important only as a guide to why they deviated from the canons of construction established by this Court.

[31] Treaty of June 9, 1855, 12 Stat. 951. This treaty is in most material respects identical to the Treaty of Hell Gate.

riparian to the river, at the fishing locations. The patentees then precluded the Indians from the lands.

In directing the patentees to accommodate the Indians in the exercise of their treaty fishing rights, this Court held:

> "the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusions would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees." (198 U.S. at 381-382).

Article III of the Treaty of Hell Gate provides:

> "The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right to taking fish at all usual and accustomed places, in common with citizens of the Territory. . ."[32]

Nothing in any of the Acts of Congress relating to the Flathead Reservation indicates an abrobation of the petitioner Tribes' fishing rights, and if there is to be an abrogation, it must be express. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). *See Antoine* v. *Washington*, 420 U.S. 194 (1975).

It has been said about the Indians of the Flathead Reservation and their treaty fishing rights:

> "The Indian society is communal in character rather than individualistic; and this is particularly true in respect of the hunting and fishing grounds of the Indians. The right of the Flathead tribes to take fish in the waters within or bordering on the Reservation is carefully defined and safeguarded in

[32] 12 Stat. at 976; App. D at 36a. This language is almost identical to the treaty language considered in *United States* v. *Winans*, *supra*.



> Article III of the treaty." *Montana Power Co.* v. *Rochester*, *supra*, at 192-193.

Riparian rights are property rights, *Ketchican Spruce Mills* v. *Alaska Concrete Prod. Co.*, 113 F.Supp. 700 (D. Alas. 1953), and the holder of those rights can exercise them to exclude others from the bed, banks, and waters involved, *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411 (1926). This is precisely what respondents are doing now, with the concurrence of the court below. A non-Indian, owning a portion of a former allotment, is permitted to exclude the Indians not only from his land, but from the Indians' own land. This controverts the holding in *Winters* v. *United States*, *supra*.[33]

The decision below denies petitioners authority to control the use of their treaty lands, in effect making them as to these lands nothing more than "private, voluntary organizations," a characterization of tribes that was rejected by this Court in *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975), and contradicts the principal of tribal self-government, reaffirmed most recently in *Bryan* v. *Itasca County*, *supra*. The lower court found no express decision by Congress with respect to the Tribes' right to control their own land,[34] yet "federal common law" of riparian rights, never before held to prevail on Indian trust lands, was found to control, superseding not only tribal law and tribal ownership rights but also the federal government's duty to fulfill its trustee obligations. This is in stark contradiction to the federal government's exercises of plenary powers over Indian lands and affairs. *McClanahan* v. *Arizona Tax Commission*, 411 U.S. at 171-173.

[33] Petitioners cannot fish where sheds and wharves or docks are located, nor where a breakwater is maintained. (See note 6, *supra*). In fact, the breakwater encloses a portion of the trust reservation lands to respondents' private use.

[34] 380 F.Supp. at 460-461, App. B 16a-17a.

Rejected was the Tribes' position that its authority over the bed of the Lake within the reservation was on the same ground as that of the several states over the beds of navigable waters within their boundaries.[35] The court distinguished that situation, saying that unlike state lands, tribal lands were held in trust. The distinction ignores well-established law that the interest of the United States is a naked title alone, with full rights of possession, use and control residing in the tribes. The tribal right is "as sacred as that of the United States to the fee." *United States* v. *Cook*, 19 Wall. 591, 593 (1873), quoted in *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497-498 (1937).[36]

The court's distinction further ignores the sovereign aspect of Indian tribes, *Bryan* v. *Itasca County, supra; Moe* v. *Confederated Salish and Kootenai Tribes*, —— U.S. ——, 96 S.Ct. 1634 (1976); *McClanahan* v. *Arizona State Tax Commission, supra*, and their power to govern even non-Indians on fee land within a reservation with respect to certain uses of that land. *United States* v. *Mazurie, supra.*

The distinction, finally, rests on the erroneous assumption that while Congress may take and control Indian trust land, it may not take and control state-owned land. It is well-established, however, that the federal power of eminent domain extends to state land and property, as it does to any other. *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941); *Yalobusha County* v. *Crawford*, 165 F.2d 867, 868 (5th Cir. 1947); *Minnesota* v. *United States*, 125 F.2d 636, 639

[35] 380 F.Supp. at 464; App. B 23a-24a.

[36] "Although the United States retained the fee, and the Tribe's right of occupancy was incapable of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple title absolute. *Cherokee Nation* v. *Georgia*, [30 U.S. 1] 5 Pet. 1, 48. *Worchester* v. *Georgia, supra* [31 U.S. 515], 580," quoted in *United States* v. *Shoshone Tribes*, 304 U.S. 111, 117 (1938).



(8th Cir. 1942). The trust status of Indian land subjects it to no greater infirmity from federal taking action than state land.

It is clear that the Tribes have always had regulatory authority over the bed of the south half of Flathead Lake and that Congress has never abrogated that authority by extending to allotments, adjacent to the Lake, federal common law riparian rights, heretofore applicable only in the inapposite locales within the District of Columbia and the federal territories,[37] and never, before this decision below, within an Indian reservation.

[37] *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U.S. 672 (1884), and *Ketchikan Spruce Mills* v. *Alaska Concrete Prod. Co.*, 113 F.Supp. 700, 701-702 (D. Alaska 1953). In *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411 (1926), this Court applied the federal common law rule only where the riparian proprietor also owned the *bank*, which respondents here do not.

## CONCLUSION

For the above reasons a writ of *certiorari* should issue to review the decision of the Court of Appeals.

Respectfully submitted,

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# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 75-1106

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THE CONFEDERATED SALISH AND KOOTENAI TRIBES, et al.,
*Plaintiffs-Appellants,*

vs.

JAMES M. NAMEN, et al., and CITY OF POLSON,
a Montana Municipal Corporation, Intervenor,
*Defendants-Appellees.*

OPINION

[May 12, 1976]

Appeal from the United States District Court for the District of Montana

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Before: BARNES, SNEED and KENNEDY, Circuit Judges.

PER CURIAM:

Defendant-appellee Namen owns property bordering upon Flathead Lake, within the boundaries of the Flathead Indian Reservation in Montana. Namen is the successor in interest to an Indian allottee who, pursuant to the Indian Allotment Act of 1904 (33 Stat. 302) and amendments thereto, obtained from the United States a patent in fee covering the lakeside property in question.

In connection with this business, Namen has constructed piers, wharves, and other structures related to navigation, which extend over the bed and bank of Flathead Lake.

The City of Polson, Montana was permitted to intervene as a defendant. The city also owns lakeside property within the Reservation, from which public docks have been constructed for recreational use.

The Confederated Salish and Kootenai Tribes brought suit in the District Court, seeking a declaratory judgment that Namen's waterfront structures were in trespass upon Indian property, and seeking injunctive relief prohibiting future trespass and requiring demolition of existing structures. The bases for the requested relief were that, allegedly, (1) the Tribes, as beneficial owners of the lake bed, have the exclusive right to control its use; (2) allotments of lakeside property were never meant to convey riparian rights; and (3) no such rights exist at present because they are not recognized in the (allegedly controlling) tribal law.

In a carefully reasoned opinion, the District Court (Judge Jameson, presiding) granted partial summary judgment in favor of defendants, recognizing the existence of their riparian rights of wharfage and access to navigable waters, but reserving judgment on the question whether existing structures abused those rights. *Confederated Salish and Kootenai Tribes* v. *Namen*, 380 F. Supp. 452 (D. Mont. 1974).

The Tribes appeal from the adverse summary judgment. This Court's jurisdiction is predicated upon 28 U.S.C. § 1292(a)(1), which allows appeals from interlocutory orders denying injunctive relief. We affirm.

The District Court concluded as a matter of law that allotments of land adjacent to the lake carried title only as far as the high-water mark of the lake, and that the United States, as trustee for the Tribes, holds title to the



banks and bed of the lake. The District Court further concluded that since title to the lake bed is held by the United States, federal common law, and not state or tribal law, governs the existence of any riparian rights associated with Namen's property. Control of the lake bed was thus found to be analogous to federal trust ownership of navigable waters in territories prior to statehood.

The District Court found that riparian rights were not expressly created by either the treaty which created the Flathead Reservation (Treaty of Hellgate, 12 Stat. 975) or the statutes under which allotments of Flathead Reservation property were granted. Nevertheless, drawing support from principles of federal common law (wherein riparian rights have traditionally been recognized; *see Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U.S. 672, 683 (1884)) and from the long history of navigation on Flathead Lake, the District Court concluded that Congress must have intended that grants of riparian lands under the Indian Allotment Acts should carry rights of access and wharfage. The District Court further concluded that to grant the relief requested by plaintiffs "would be a grievous injustice to the defendants and others in a similar position." 380 F. Supp. at 466. Accordingly, partial summary judgment was granted in favor of defendants.

After a careful review of the arguments made on appeal, we have concluded that the District Court's reasoning was correct. We therefore adopt Judge Jameson's opinion below as the opinion of this court.

AFFIRMED.

## APPENDIX B

THE CONFEDERATED SALISH AND KOOTENAI TRIBES, et al.,
*Plaintiffs,*

v.

JAMES M. NAMEN, et al., and City of Polson,
a Montana municipal corporation, Intervenor,
*Defendants.*

Civ. No. 2343

United States District Court, D. Montana,
Missoula Division

Aug. 14, 1974

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Richard A. Baenen of Wilkinson, Cragun & Barker, Washington, D.C., and Victor F. Valgenti, Missoula, Mont., for plaintiffs.

Poore, McKenzie, Roth, Robischon & Robinson, Butte, Mont., for defendants.

Christian, McCurdy, Ingraham & Wold, Polson, Mont., for intervenor City of Polson.

Boone, Karlberg & Haddon, Missoula, Mont., for the Flathead Lakers, Inc.

JAMESON, District Judge.

The plaintiffs, The Confederated Salish and Kootenai Tribes of the Flathead Reservation (Tribes) and Harold W. Mitchell, Jr., chairman of the Tribal Council, instituted this action for declaratory and injunctive relief against the defendants, James M. Namen, Barbara J. Namen, A. J. Namen, and Kathryn Namen, the owners of land located in Polson, Montana on the south half of



Flathead Lake, which is a part of the Flathead Indian Reservation. Plaintiffs seek a judgment declaring that "the defendants are in trespass upon plaintiffs' land to the extent that they maintain and have erected buildings and structures beyond the high water mark * * * of Flathead Lake and encroach on the bed and banks of said Lake".[1] They ask the court to enjoin all further trespass and that "defendants be directed to immediately remove all buildings and structures, including landfills, that extend beyond" the high water mark and that the lands below the high water mark "be restored to their original condition".

Defendants filed a motion to dismiss for failure to state a claim. Plaintiffs filed a motion for summary judgment. The City of Polson was permitted to intervene and filed an answer.[2] Flathead Lakers, Inc. was granted leave to file a brief as amicus curiae.[3]

At a hearing on March 22, 1974 the parties agreed upon most of the facts essential to a determination of the pending motions and were granted time for further dis-

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[1] The complaint alleged a high water mark "elevation of 2893.2 feet". The parties were unable to agree upon the elevation. At a hearing on March 22, 1974 plaintiffs agreed that for the purpose of this action any reference to a stated elevation "should be considered altered to merely state at the highwater mark at whatever it may be".

[2] The motion to intervene recited, *inter alia*, that the City of Polson owns land fronting the south half of Flathead Lake, on which it has developed a recreational area, with public docks used for swimming and boating; that the dock is located on land between high and low water marks of the Lake; that the City has levied taxes against the dock, boat house and wharf facilities of the defendants.

[3] An affidavit in support of the petition to file brief recited that The Flathead Lakers, Inc., is a non-profit corporation having in excess of 2,000 members, with a very substantial part of the members owning real property fronting on the shores of the south half of Flathead Lake.

covery and supplemental briefs. The court suggested that the motion of the defendants to dismiss be considered a motion for summary judgment. The defendants and intervenor[4] have now agreed that their motions to dismiss may be considered as motions for summary judgment pursuant to the provisions of Rules 12(b) and 56 of the Federal Rules of Civil Procedure.

All parties have conducted extensive discovery and have filed comprehensive and well considered briefs. The court is satisfied that there is no genuine issue as to any material fact with respect to the primary issue of whether the defendants as owners of property riparian to the south half of Flathead Lake have the riparian rights of access and wharfage.

*Statement of Facts*

The following facts are not disputed by any of the parties:

(1) The plaintiff Tribes are a confederation of American Indian Tribes organized pursuant to the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461 et seq., with a governing body recognized by the Secretary of the Interior. The plaintiff Mitchell is an enrolled member of the Tribes and is chairman of the Tribal Council.

(2) The Flathead Reservation was created pursuant to the Treaty of Hellgate, July 16, 1855, 12 Stat. 975, reserving for the plaintiff Tribes the land embraced by the following boundaries:

> "Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's

[4] The answer of the City of Polson included a motion to dismiss for failure to state a claim.



> Fork between the Camash and Horse prairies; thence northerly to, and *along the divide bounding on the west the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremeties of the Flathead Lake*; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, thence southerly along said divide to the place of beginning." (Emphasis added).

(3) In 1908 the United States, pursuant to the Act of April 23, 1904, 33 Stat. 302, as amended, allotted to Antoine Morias (Indian Allotment No. 1378) the following lands within the Reservation:

> "The Lot one, the east half of the Lot two, and the southeast quarter of the southeast quarter of section three in Township twenty-two north of Range twenty west of the Montana Meridian, Montana, containing seventy-five and forty-two-hundredths acres."

These lands are riparian to the south half of Flathead Lake, which is a navigable body of water. The south half of Flathead Lake was included in the lands reserved to the Tribes by the Treaty of Hellgate.

(4) The defendants, James M. Namen, Barbara J. Namen, A. J. Namen, and Kathryn Namen are the owners in common through successive conveyances of portions of the Morias allotment described as the east half of Lot 2, Section 3, Township 22 North, Range 20 West, Montana Principal Meridian.

(5) The defendant James M. Namen operates a business known as Jim's Marina, Polson, Montana on these riparian lands, and "as proprietor of Jim's Marina has erected and maintained certain buildings and structures which extend beyond the high-water mark of the lake and encroach on the bed and banks of Flathead Lake".

Among the structures which extend beyond the high water mark are: (a) docks, wharves and piers; (b) a breakwater built in 1973; and (c) a storage shed.

(6) The breakwater extends for some distance into the lake below high water mark. "The width of the breakwater, from water line to water line is approximately 16 feet, and the sides of the breakwater descend at an angle so that the width of the breakwater along the bed of the lake is in excess of 16 feet."

(7) The marina and assorted structures that encroach on the bed and banks of the lake below high water mark are utilized for business or commerce in connection with Flathead Lake.

(8) During the period from around the turn of the century into at least the 1920's, Flathead Lake was used at various times and on various occasions for commerce; * * * boats and related water vehicles traveled the lake from one end to the other."

(9) Wild Horse and Cromwell Islands lie within the south half of Flathead Lake. All lands on Wild Horse Island were conveyed under the allotment act of 1904 (33 Stat. 302) as amended.

For the purpose of considering the pending motions the court also concludes as a matter of law:

(1) The land within the original boundaries of the reservation, including the land owned by the defendants and the south half of Flathead Lake, is still part of the Flathead Reservation.[5]

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[5] It is clear from Mattz v. Arnett, 412 U.S. 481, 93 S.Ct. 2245, 137 L.Ed.2d 92 (1973) and 18 U.S.C. 1151, that all lands embraced within the original boundaries of the Flathead Reservation are still part of that Reservation, even though parts of the reservation were opened to settlement by non-Indians under various land acts. The "reservation is located in four counties of the state, Missoula, Lake, Sanders and Flathead, and consists of approximately 1,250,000 acres of which 615,418 acres is trust land. The total resident membership of the tribe is 19 percent of the total population living within the exterior boundaries of the reservation." Security State Bank v. Pierre, 511 P.2d 325, 326 (Mon. 1973).



(2) The allotment of Antoine Morias conveyed title only to the high water mark at Flathead Lake, and the high water mark is the boundary of the defendants' property.[6]

(3) Since the time of the Treaty of Hellgate, the United States has held and still holds the bed and banks of Flathead Lake below high water in trust for the plaintiff Tribes.[7]

*Contentions of Parties*

Defendants and intervener claim a right of access to Flathead Lake, together with the concomitant right to construct and maintain "dock, wharf and pier facilities" on the bed and banks of the south half of Flathead Lake below high water mark. They contend that the estate reserved to the Tribes in the south half of Flathead Lake by the Treaty of Hellgate is not absolute. Rather, they contend, (1) the riparian rights of wharfage may be

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[6] As was stated in Montana Power Co. v. Rochester, 127 F.2d 189, 192 (9 Cir. 1942), a case involving a boundary dispute on Flathead Lake: "The general rule, of course, is that patents of the United States to lands bordering navigable waters, in the absence of special circumstances, convey only to high water mark".

[7] As the court said in *Rochester*, *supra* at 191, "Whether the ownership was originally in the Indians or in the United States, it is certain that by the treaty the United States undertook to hold title to the reserved area, including the bed of the southerly half of the lake, in trust for the confederated tribes." The defendants admit for the purpose of their own motion that the United States holds title to the bed and banks of Flathead Lake below the high water mark in trust for the Tribes. Questioning the rationale of *Rochester*, defendants refuse to make this admission for the purpose of plaintiffs' motion. This court holds, as it did in United States v. Pollmann, 364 F.Supp. 995, 999 (D.Mont. 1973), that *Rochester* is controlling.

implied from provisions of the Hellgate Treaty and the Treaty of the Upper Missouri; (2) the estate reserved to the Tribes has been limited by allotment and settlement statutes which manifested a Congressional intent "to grant riparian rights which accompany lakeshore property"; and (3) the owners of lands riparian to Flathead Lake acquired under the allotment and settlement statutes are entitled to the riparian rights of access and wharfage under federal common law doctrine.

Plaintiffs contend that as the beneficial owners of the bed and banks of the lake below high water mark, they have the right to control the use of that land. They argue that no rights below the high water mark were ever extended to the owners of riparian lands by either treaty or statute. Finally, they contend that federal common law principles of riparian rights are not applicable, but rather that tribal law is controlling and the Tribes have never granted riparian rights to owners of lakeshore property.

*Hellgate Treaty and Treaty of Upper Missouri*

Defendants contend that the riparian right of wharfage may be implied from certain provisions in the Hellgate Treaty and the Treaty of the Upper Missouri. The court cannot agree.

Article III of the Hellgate Treaty provides in part:

> "That if necessary for the public convenience roads may be run through the said reservation; and, on the other hand, the right of way with *free access* from the same to the nearest public highway is secured to *them*; as also the right in common with citizens of the United States to travel upon all public highways." (Emphasis added).

It is true, as defendants point out, that under 43 U.S.C. § 931 navigable rivers are "deemed public highways" and under 22 U.S.C. § 10 the navigable rivers and waters within the Louisiana Purchase are "public highways". However, when Article III refers to securing free access to the public highway "to them", it is not clear whether the word "them" refers to the public in general or to members of the Tribe. After providing for roads for the public convenience, the article continues with the phrase "on the other hand". The language following may reasonably be construed as referring to members of the Tribe. Doubtful expressions must be resolved in favor of the Indians. Carpenter v. Shaw, 280 U.S. 363, 367, 50 S.Ct. 121, 74 L.Ed. 478 (1930); McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1974). The provision for right of free access to public highways must therefore be found to be for the benefit of members of the Tribes.



Even if "them" were interpreted to mean the general public, it would be improper to construe the term "public highway" in the Treaty as including the south half of Flathead Lake. As stated in Carpenter v. Shaw, *supra*,

> " 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.' Worcester v. The State of Georgia, 6 Pet. 515, 582 [31 U.S. 515, 8 L.Ed. 483] . . . And they must be construed, not according to their technical meaning, but in the sense in which they would naturally be understood by the Indians.' Jones v. Meehan, 175 U.S. 1, 11 [20 S.Ct. 1, 44 L.Ed. 49]." *Id.*

The court agrees with the plaintiffs that to construe public highway to include the southern half of Flathead Lake

"requires a finding that the unlettered Indians in 1855 understood 'road' to mean 'water' and that one of the 'roads' that *might* be run through their Reservation was already there and was 180 square miles large". Such an interpretation is clearly forbidden by *Shaw* and numerous subsequent decisions.

The Treaty of the Upper Missouri, 11 Stat. 657, was entered into on October 17, 1855 (three months subsequent to the Hellgate Treaty) between the United States and a number of tribes, including the Flathead, Upper Pend d'Oreilles and Kootenai.[8]

Article VIII of the Treaty provides:

> "For the purpose of establishing travelling thoroughfares through their country, and the better to enable the President to execute the provisions of this treaty, the aforesaid nations and tribes do hereby consent and agree, that the United States may, within the countries respectively occupied and claimed by them, construct roads of every description . . . *and that the navigation of all lakes and streams shall be forever free to citizens of the United States.*" (Emphasis added).

Defendants contend that this provision, especially the last clause, supports their claim to the riparian right of wharfage. This provision, however, is nothing more than a recognition of the public's right of navigation. The public's right of navigation and the riparian owners' wharfage rights are separate and distinct rights. The latter do not automatically derive or result

[8] While the Flatheads and Nez Perce tribes were parties to this treaty, it was concerned primarily with the establishment of the Blackfeet Reservation, "the definition of [its] boundaries, the prevention of disputes among the tribes, and the establishment of peace". Colliflower v. Garland, 342 F.2d 369, 371 (9 Cir. 1965). See also Blackfeet and Gros Ventre Tribes, 127 Ct.Cl. 807, 809, 119 F.Supp. 161, 162 (1954), cert. denied, 348 U.S. 835, 75 S.Ct. 58, 99 L.Ed. 658 (1914).



from the former. The right of wharfage is a private right which is not everywhere recognized, whereas the right of navigation is a public right which all jurisdictions respect and which is superior to the right of wharfage. See Yates v. Milwaukee, 77 U.S. 497, 19 L. Ed. 984 (1871); 1 Wiel, Water Rights in the Western States, Section 904, p. 942 (3rd ed. 1911); 1 Clark, Waters and Water Rights, Section 37.2(c) pp. 209-210 (1967). The court agrees with plaintiffs that the Treaty of the Upper Missouri "does not speak to riparian rights below high water mark of any navigable lake or stream", and although it "might be applicable to a boating case involving Flathead Lake, here * * * it is irrelevant".

### *Effect of Allotment Acts and Other Congressional Enactments*

Defendants next argue that, under the General Allotment Act of 1887 and the 1904 Allotment Act and its numerous amendments, it is evident "that Congress intended those owners fronting on the lake to own and possess all water rights in and to Flathead Lake which a normal riparian owner would possess", and that these riparian rights include the right to erect boating and wharf facilities. In determining the effect of the Congressional Acts it is recognized that while the power to abrogate treaty rights exist, "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress". Pigeon River Co. v. Cox Co., 291 U.S. 138, 160, 54 S.Ct. 361, 367, 78 L.Ed. 695 (1934), quoted in Menominee Tribe v. United States, 391 U.S. 404, 413, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). On the other hand, although statutes terminating or limiting treaty rights "should be construed narrowly", the courts "cannot ignore the intention of Congress where it is perfectly plain". United States v. Seaton, 101 U.S. App.D.C. 234, 248 F.2d 154, 155 (1957).

With the enactment of the General Allotment Act of 1887 (24 Stat. 388) the Federal Government commenced a general policy of alloting tribal lands within the various reservations to individual Indians. Generally, this system provided for the grant of a specified number of acres, with the grant held in trust for a period of 25 years, after which the allottee was issued a patent in fee. The Act authorized the Secretary of the Interior to prescribe rules and regulations deemed necessary to secure a joint and equal distribution of waters for irrigation, whether or not the lands were riparian. See United States v. Power, 305 U.S. 527, 533, 59 S.Ct. 344, 83 L.Ed. 330 (1939).

The allotment system was specifically applied to the Flathead Reservation by the Act of April 23, 1904, 33 Stat. 302, which provided for the survey and allotment of the lands within the Reservation and the sale and disposal of surplus lands remaining after allotment. Following allotment, a commission was appointed by the President to inspect, appraise and value unallotted lands and to classify the lands as agricultural, timber, mineral or grazing lands. The unallotted lands were then open to settlement and entry by Presidential proclamation and disposed of "under the homestead, mineral, and town-site laws of the United States" which speak of "rights to the use of water for mining, agricultural, manufacturing, or other purposes". 30 U.S.C. § 51.

The Allotment Act of 1904 was subsequently amended on a number of occasions to further implement the policy of allotment and settlement on the Flathead Reservation.[9] The Act of June 21, 1906, 34 Stat. 325, 354 provided for the surveying and platting of town-sites at various settlements within the Reservation, and added Section 19 to the 1904 Act to provide that nothing in the Act should be construed to deprive "any of said Indians, or said persons or corporations to whom the use of land is granted by the Act" of water appropriated and used for irrigation and domestic purposes.

[9] The Act was amended in 1905, 33 Stat. 1048, 1081 to provide for a grant to the State of Montana for the use of the University of Montana for biological station purposes. That station is located on the banks of the south half of Flathead Lake.



By the Act of May 29, 1908, 35 Stat. 444, Congress provided that alloted lands "which can be sold under existing law * * * may be sold on the petition of the allottee", and "That upon the approval of any sale hereunder by the Secretary of the Interior he shall cause a patent in fee to issue in the name of the purchaser for the lands so sold * * *."

In the Villa Sites Act of 1910, 36 Stat. 296-297, Section 23 was added to the 1904 Act, providing for the survey and subdivision into two to five acre lots of "all of the unallotted lands fronting on Flathead Lake * * * that are embraced within the limits of the Flathead Indian Reservation" and for sale thereof "to the highest bidder at public sale". An advertising circular issued by the Department of the Interior in connection with the sale of the Villa Sites stated that "The lake is utilized for bathing, sailing, boating, and yachting, and several steamboats ply between the various towns upon its borders. The shores are well adapted for boat landings and the erection of wharves." This circular also recited that "Trains from Kalispell, on the Great Northern Railway, connected Somers for the morning trips of the steamers over the lake to Polson, and from Somers to Big Arm by way of Dayton, Elmo, and many other wharf landings on the western shore." [10]

[10] The Report of the Committee on Indian Affairs on Senate Bill 3983, the Villa Sites Act, submitted by Senator Dixon of Montana, reads in pertinent part:

> "The Flathead Indian Reservation has been surveyed and allotments made to all of the Indians holding tribal relations

The Act of 1904 was amended in 1911 (36 Stat. 1066) and 1912 (37 Stat. 527) to provide that patents for all tracts of land on Flathead Lake should be subject to easements for storage for irrigation or development of water power. A further amendment in 1919 (40 Stat. 1203) provided that the Secretary of the Interior designate surplus lands bordering on streams within the Flathead Reservation as "valuable for stock-watering purposes", and dispose of the lands under the terms of the 1904 Act.[11]

None of the Acts, or amendments thereto, in express terms grant riparian rights to the owners of the lake frontage property.[12] Nor do they contain any express reservation or exception with respect to these rights. The crucial question then is whether these acts, when viewed in the context of long established common law principles governing riparian rights, indicate that Congress intended the grants of riparian lands pursuant

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with the Flathead Indians. The bill in question proposes to survey and subdivide into small lots for summer-residence cites the entire unallotted lands fronting on Flathead Lake, the proceeds from the sale of these lots to be used in furthering the reclamation of the allotted Indians' lands which is now being carried on. The lands fronting on this lake are of little agricultural value, and it is believed that a large amount of money can be realized from the sale of the lake frontage; much more than can be realized under the present status of these lands, opening them to settlement. * * * Your committee is of the unanimous belief that the proposed legislation is most meritorious and for the benefit of the Flathead Indians." Sen. Rep. No. 17, 61st Cong. 2d Session.

[11] The allotment system and policy of settlement of unallotted lands was terminated by Congress in the Wheeler-Howard (Indian Reorganization) Act of June 18, 1934, 48 Stat. 984, under which the Tribes were organized.

[12] The express provisions in all of the Acts relating to water rights are concerned with the use of water for agriculture, mining, manufacturing or power purposes.



to the allotment acts to convey the rights of access and wharfage.

*Applicability of Federal Common Law Rules with Respect to Riparian Wharfage Rights on Navigable Waters*

The nature and extent of riparian rights, if any, in the bed and banks of navigable waters is generally a matter of state law. This is a consequence of the rules that (1) the United States holds title to the bed and banks of navigable waters in trust for future states; and (2) upon admission of a state to the Union, the United States relinquishes to the state the ownership of the bed and banks of its navigable waters. See Shively v. Bowlby, 152 U.S. 1, 48-49, 14 S.Ct. 548, 38 L.Ed. 331 (1894). The south half of Flathead Lake presents an exception. Title to the bed and banks of the south half of Flathead Lake below high water mark is held by the United States in trust for the Tribes. Thus, the basis for state determination of riparian rights is non-existent. State law, therefore, is not applicable.

The federal common law with respect to the riparian rights of access and wharfage is clear. Following a long line of earlier cases, the Supreme Court in United States v. River Rouge Improvement Co., 269 U.S. 411, 418, 46 S.Ct. 144, 146, 70 L.Ed. 339 (1926) stated:

> "It is well settled that in the absence of a controlling local law otherwise limiting the rights of a riparian owner upon a navigable river, Shively v. Bowlby, 152 U.S. 1, 40 [14 S.Ct. 548, 38 L.Ed. 331], he (the riparian owner) has, in addition to the rights common to the public, *a property right, incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by public law may construct landings, wharves or piers for this purpose.*" (Citations omitted), (emphasis added).

There are few decided cases involving the riparian rights of access and wharfage as they relate to federally held beds of navigable waters. Those cases which have considered the question, however, consistently recognize these riparian rights.

In Potomac Steamboat Co. v. Upper Potomac Steamboat Co., 109 U.S. 672, 683, 3 S.Ct. 445, 27 L.Ed. 1070 (1884) the Supreme Court, quoting from Yates v. Milwaukee, *supra* (77 U.S. 497, 10 Wall. 497, 19 L.Ed. 984 at 986), stated that among the rights to which a riparian owner on the navigable Potomac River is entitled are:

> " 'Access to the navigable part of the river from the front of his lot, the right to made a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatever those may be.' " [13]

This same rule was applied in the former Territory of Alaska. As was stated in Ketchikan Spruce Mills v. Alaska Concrete Prod. Co., 113 F.Supp. 700, 701-702 (D. Alaska 1953): "It is well established that a right of access * * * is a property right and may be exercised by constructing a wharf, pier or dock over the intervening tide lands to the navigable waters." [14]

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[13] See also Martin v. Standard Oil of New Jersey, 91 U.S.App. D.C. 84, 198 F.2d 523, 526 (1952); United States v. Groen, 72 F.Supp. 713, 720 (D.D.C. 1947); and United States v. Belt, 79 U.S.App.D.C. 87, 142 F.2d 761, 767 (1944).

[14] See also Worthen Lumber Mills v. Alaska Juneau Gold Mining Co., 229 F. 966, 970 (9 Cir. 1916); Dalton v. Hazelez, 182 F. 561, 573 (9 Cir. 1910); Decker v. Pacific Coast S.S. Co., 164 F. 974, 976 (9 Cir. 1908); and Columbia Canning Co. v. Hampton, 161 F. 60, 64 (1908).



Plaintiffs do not question the existence or propriety of these federal common law rules, but argue that they are not applicable because: (1) the Tribes, like states, have control over the beds and banks of navigable waters, and the "Tribes have not authorized the erection or maintenance of defendants' structures . . ."; (2) "The United States, acting in its supervisory capacity as trustee, has consistently recognized the Tribes' * * * right to assert full jurisdiction and control over wharfage rights along the lake;" (3) the lands involved are Indian trust lands which the Treaty of Hellgate reserved for the "exclusive use and benefit" of the Tribes; and (4) in allotting and authorizing the conveyance of tribal lands, Congress did not expresssly grant riparian rights and such a grant cannot be implied.

*(1) Applicability of Tribal Law*

Plaintiffs contend that tribal law and not federal law governs the use of the bed and banks of the south half of Flathead Lake. This contention is based in part upon a suggested analogy to the rule of Shively v. Bowlby, *supra*. According to *Shively*, prior to admission of a state into the Union, the beds and banks of navigable waters are held by the United States in trust for the future state. Upon admission, the new state receives full legal ownership of the beds and banks of its navigable waters. As a result, state law governs the questions of ownership, use and control of the bed, including wharfage rights. Plaintiffs argue that the Tribes stand in the same position as a state with respect to the ownership and control over the bed and banks of the south half of Flathead Lake.

The analogy, however, is faulty. While a state has legal title to the bed and banks of its navigable waters, the Tribes do not. Rather, title to the bed and banks of the south half of Flathead Lake is held by the

United States in trust for the Tribes. Congress has the power to grant title or rights in the bed and banks of the Lake as well as any other interests in Indian trust lands. Congress has no such power *vis-a-vis* the states. Moreover, barring Congressional action, the Tribes can never secure legal ownership as a state does. If analogies are to be drawn, therefore, the Tribes' position is more nearly that of a territory than of a state. Applying the principles of *Shively*,[15] *Potomac Steamboat Co.*, and *Ketchikan Spruce Mills*, the court concludes that federal law is applicable. As discussed *supra*, the federal courts have consistently recognized the riparian rights of access and wharfage with respect to federally held beds and banks of navigable waters.

Plaintiffs, in their reply brief of February 12, 1974 further buttress their argument that tribal law is controlling by quoting extensively from McClanahan v. Arizona State Tax Commission, *supra*. There the Court discussed at length the Indian sovereignty doctrine, reaffirming prior holdings that the Federal Government has largely permitted the Indians "to govern themselves, free from state interference", and that the Indian reservations were meant to establish "exclusive sovereignty" of the Indians "under general federal supervision". Plaintiffs recognize that *McClanahan* was concerned with the applicability of state law to a reservation and its Indian inhabitants, a question not here presented, but argue that the principles there enunciated are fully applicable.

The court cannot agree. In the complex, and sometimes uncertain, area of Indian law, care must be exercised in attempting to apply language used in one factual situation in a totally different context. *McClana-*

[15] Shively v. Bowlby recognizes the right of the United States to grant title or rights in the land below the high water mark of navigable waters prior to statehood.



*han* was concerned with the right of a state to impose a tax upon income earned by an Indian on a reservation. Here we are concerned with the rights of both individual Indians and their non-Indian grantees under grants by the Federal Government pursuant to Congressional action. There can be no doubt that the authority of the Federal Government is superior to that of the Tribe.[16] Congress was exercising that authority in enacting the Allotment Acts. We are concerned then with the intent of Congress with respect to riparian rights in providing for the allotment and sale of lands fronting on a navigable lake.

*(z) Federal Recognition of Tribal Jurisdiction*

[21, 22] In support of their contention that no riparian rights of the nature claimed by defendants were conveyed by the Federal Government, plaintiffs direct the court to two letters—one dated August 16, 1955 from the Acting Commissioner of Indian Affairs to Senator Mansfield, and the other dated February 18, 1959 from an Assistant Commissioner to the chairman of the Tribal Council.[17] Both letters concern the right of the Tribes

[16] Plaintiffs "agree the United States has a power paramount to that of the Tribes over tribal lands and waters and the United States, by clear Act of Congress, can exercise that power to the derogation of the tribal power". They contend, however, that "here the United States has not so acted, and, therefore, the power to regulate the use of tribal land and water resided unimpaired in the Tribes". (Plaintiffs' Supplemental Memorandum filed May 15, 1974).

[17] The first letter recites that under *Rochester* the title to the bed and banks of the south half of Flathead Lake below high water mark "is in the United States in trust for the Confederated Tribes," and that "It is therefore within the power of Confederated Tribes to lease these drawdown lands * * *". The second letter similarly states that title of the lands is in the United States in trust for the Indians and that "either leases or permits may be used in granting the use of tribal lands for dock sites or piers, across the flowage easement and into the permanent lake pool".

to grant leases or permits for the use of lands below high water mark on the south half of Flathead Lake. They indicate that the Tribes have complete authority to regulate the use of those lands. While it is true that interpretations of a law by the agency responsible for its enforcement are to be given deference, Udall v. Tallman, 380 U.S. 1, 18, 85 S.Ct. 792, 13 L. Ed.2d 616 (1965), the letters are not persuasive. Both letters were written almost a half century after the initial allotments and conveyances of the land.[18] Neither letter considers the federal common law principles with respect to access and wharfage. Nor does either letter deal expressly with the effect of prior allotments and conveyances of riparian lands pursuant to the Allotment Acts. More persuasive in determining Congressional intent is the legislative history of the Villa Sites Act (see note 10), as well as the bulletin issued by the Secretary of the Interior in connection with the sale of the Villa Sites, stating that Flathead Lake "is utilized for bathing, sailing, boating, and yachting, and several steam boats ply between the various towns upon its borders. The shores are well adapted for boat landings and the erection of wharves." [19]

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[18] Moreover, it appears from affidavits of Namen and one of his predecessors in interest that at least since 1948 "the shore and banks thereof" have been used for "docks, wharf and pier purposes". An affidavit filed by Intervener, City of Polson, recites that a lumber mill was constructed in 1909 on allotted land "located about 100 yards from the West boundary line of the Morias allotment", and that "lands between the high water mark of and the bed of Flathead Lake were utilized for log storage, saw mill tramways, and lumber shipping docks".

[19] It is true, as plaintiffs state, that the circulars referred specifically to the Villa Sites, and we are here concerned with riparian rights of a portion of an allotment made prior to the Villa Sites Act. The patents issued pursuant to the Villa Sites Act, however, contain the same provisions as those under the 1904 Act. Neither made any express reference to riparian rights, and neither contained any reservation or exception with respect to those rights. As set forth in the two letters (note 17), patents issued under both acts were subject to flowage easements for storage of water for irrigation or development of water power, pursuant to the Acts of March 3, 1911 and August 24, 1912.



Plaintiffs also argue that the State of Montana has recognized the Tribes' right to control the bed of Flathead Lake, since on two occasions when the State built bridges crossing Flathead Lake and River it applied for rights-of-way to cross the Lake and River beds and paid damages therefor. Plaintiffs point out also that, although Congress gave the Secretary of the Interior the power to grant rights-of-way across Indian land, it also provided that such grants may not be made across lands of tribes organized under the Indian Reorganization Act "without the consent of the proper tribal officials". 25 U.S.C. §§ 324 and 325. We are not concerned, however, with rights of the State of Montana or with bridges or rights-of-way, but rather with rights acquired by Indians and their grantees through allotments prior to the Indian Reorganization Act of 1934, which terminated the allotment policy.

*(3) Effect of Status of Indian Trust Land*

Plaintiffs' next contend that the federal common law principles are inapplicable because the lands involved are Indian trust lands which have been reserved for the "exclusive use and benefit" of the Tribes. The mere fact that the lands are held in trust does not compel the conclusion that federal common law is not applicable. The beds of navigable waters within the former Territory of Alaska were, according to the rationale of *Shively, supra*, held by the United States in trust for the State of Alaska, (Dalton v. Hazelez, *supra*, 182 F. at 572) and the beds of navigable waters within the District of Columbia are likewise "vested in the United States for the benefit of the people". United States v. Groen, *supra* 72 F.Supp. at 719. Yet, as discussed *supra*,

the courts in both instances have recognized the private rights of wharfage and access in riparian proprietors. The fact that the lands were held in trust for Indians, therefore, is not in itself compelling, particularly in view of the power of Congress to grant titles which include these rights. The Federal Government in any event holds title, and it is federal law that applies.

It is true, as plaintiffs point out, that Article II of the Hellgate Treaty sets apart the Flathead Reservation for "the exclusive use and benefit" of the Tribes. As previously noted, however, the exclusivity of the Reservation has been sharply limited by the allotment of its lands to individual Indians, the provisions that allotted lands could be sold to non-Indians, and the massive settlement of surplus unallotted lands by non-Indians.[20] While the Flathead Reservation continues to exist, and the land within its original exterior boundaries is still Indian country, it would defy reality to hold that the entire Reservation presently exists for "the exclusive use and benefit" of the Tribes.

*(4) Failure to Expressly Grant Riparian Rights*

With respect to their final contention—that because riparian rights were not expressly granted by Congress they cannot be implied—plaintiffs raise two fundamental priciples of Indian law: (1) Only Congress has the power to abrogate Indian property rights (see Lone Wolf v. Hitchcock, 187 U.S. 553, 565-566, 23 S.Ct. 216, 47 L.Ed. 299 (1903)); and (2) status in derogation of Indian property rights, must be narrowly construed. See Menominee Tribe of Indians v. United States, *supra*.

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[20] As indicated in note 5, less than half of the Flathead Reservation is now trust land, and members of the Tribes comprise less than 20 per cent of the population living within the exterior boundaries of the Reservation.



The court of course recognizes these standards. There can be no question however, that by means of the General Allotment Act and the amendments thereto, the Congress expressed an intent to exercise its dominant power over Indian lands by dividing and conveying those lands, including lands riparian to Flathead Lake, in fee to Indians and non-Indians. Moreover, as discussed previously, the United States Government, decades before the allotment acts were passed, had taken the position that the riparian rights of access and wharfage were property rights, i.e. incidents of ownership of those holding land riparian to navigable waters.[21] In each case in which title to the bed and banks of navigable rivers is held by the Federal Government, the courts have held that riparian owners have the rights of access and wharfage. *Potomac Steamboat Co., supra; Ketchikan Spruce Mills, supra.*

Did Congress intend that the fee patents to allottees and purchasers of lakeshore property would include the riparian rights of access and wharfage? In that determination it is of course necessary to consider all of the treaties,[22] statutes and cases cited by the respective parties, as well as the undisputed facts. As the court said in Stevens v. C.I.R., 452 F.2d 741, 744 (9 Cir. 1971), "Federal policy toward particular Indian tribes is often manifested through a combination of general laws, specific acts, treaties, and executive orders. All must be considered in pari materia in ascertaining congressional intent. Kirkwood v. Arenas, 9th Cir. 1957, 243 F.2d 863, 867."

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[21] Dutton v. Strong, 66 U.S. 23, 31, 1 Black 23, 17 L.Ed. 29 (1861); Yates v. Milwaukee, 77 U.S. 497, 504 (10 Wall. 497), 19 L.Ed. 984 (1871).

[22] Although the court has rejected defendants' contention that riparian rights were implied in the Hellgate Treaty and Treaty of the Upper Missouri, there is nothing in either treaty which would preclude Congress from granting these rights to an Indian allottee and his assigns.

None of the parties have cited, nor has the court found, any case which has considered the precise question here presented, i.e. whether the owners of riparian property on navigable waters, acquired from the United States as trustee for an Indian tribe, have the riparian rights of access and wharfage. Defendants rely in part upon cases in which the courts have applied common law rules in other contexts in determining the rights of allottees and other grantees of Indian lands. In *Rochester, supra*, the court applied the "general rule" which "has its roots in the principle of the common law" in holding that "patents of the United States to lands bordering on navigable waters, in the absence of special circumstances, convey only to high water mark". 127 F.2d at 192.

In Oklahoma v. Texas, 258 U.S. 574, 42 S.Ct. 406, 66 L.Ed. 771 (1922), the Court, dealing with lands once part of an Indian reservation, applied common law doctrine in holding that patents to lands riparian to non-navigable streams convey title to the middle of the stream. In Fontenelle v. Omaha Tribe of Nebraska, 430 F.2d 143 (8 Cir. 1970), the owner of a former Indian allotment sued to quiet title to land formed when the Missouri River receded from its meander line. The court affirmed the district court's application of "the general rule that land added by accretion to tracts which were riparian at the time of the official survey and plat is the property of the riparian owner". *Id.* at 147.

The court agrees with plaintiffs that these and other cases cited by defendants are not precisely in point since they deal with boundaries and accretion, questions usually determined by federal law even where riparian rights are determined by state law. Bonelli Cattle Company v. Arizona, 414 U.S. 313, 94 S.Ct. 517, 523, 38 L.Ed.2d 526 (1973).[23] The cases are significant, however, in that

[23] *Bonelli* merely reiterates the general rule that the extent of a federal grant on a navigable stream is a federal question demanding the application of federal law, while the nature of the rights of riparian owners in the bed and banks of navigable streams is a state determination. That is because title to the bed and banks of navigable waters is vested in the states upon statehood. Prior to the admission of a state, title to the bed and banks of navigable streams was held in trust by the Federal Government and federal law was determinative of the rights of riparian owners. See, *Potomac Steamboat Co., supra.*



they stand for the propositions that: (1) federal common law is applied to determine the extent of federal grants of Indian land; (2) express Congressional language is not considered a prerequisite to the application of federal common law principles to federal grants of tribal lands; and (3) the fact that Indian land is involved does not necessitate the application of different principles in determining the extent of a federal grant.

*Conclusion*

Thus, an analysis of the relevant case law firmly establishes two principles:

(1) In all other situations in which the Federal Government holds title to the beds and banks of navigable waters, a fee patent issued by the United States to riparian lands would include the rights of access and wharfage without an express provision in the patent. This was established as early as 1861 in Dutton v. Strong, *supra*, and consistently followed in many subsequent cases.

(2) Where the United States holds title in trust for Indian Tribes, federal common law is applicable to a determination of the extent of a federal grant despite the lack of any express Congressional language to that effect.

Given these principles, this court cannot escape the conclusion that Congress must have intended that the fee patents issued pursuant to the Act of April 23, 1904

would include the customary riparian rights of access and wharfage. The fact that Congress did not expressly delineate these rights does not negate their existence. It was not necessary for Congress to specify every incident of ownership which accompanies a patent to lands on an Indian Reservation.

This conclusion is confirmed by the Senate Report on the Villa Sites Act in 1910 and the circular issued by the Department of the Interior.[24] Certainly, without the rights of access and wharfage, lands riparian to the south half of Flathead Lake would not have been considered as valuable as suggested in the report and circular.

It is significant also that for more than half a century the defendants and other riparian owners, with the full knowledge of the Federal Government and the Tribes[25] and without objection from either, expended large sums of money for docks and wharves abutting their lands on the south half of Flathead Lake. Many persons built and maintain homes and business enterprises. Wharves and piers were constructed, boats and ships plied their way through the area, and commerce was carried on.

Now, after more than fifty years of such activity on the Lake, plaintiffs claim that the riparian owners who have constructed piers and wharves beyond the high

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[24] The court agrees with plaintiffs that it is the intent of Congress rather than the Department of the Interior which is controlling, but it has long been recognized that the Secretary of the Interior is the executive arm of the Government to execute the declared Congressional policy with the Indians.

[25] It is of course clear that there is no statute of limitations, and the doctrine of laches is not applicable. The long recognition of the riparian rights of the defendants and others does suggest, however, that the Department of the Interior assumed a Congressional intent that the patents include riparian rights.



water mark are trespassers, should be enjoined from further trespass, and be requested to move immediately all buildings and structures beyond the high water mark.[26] To grant this relief in the light of the factual and legal considerations set forth above, would be a grievous injustice to the defendants and others in a similar position.

The court, therefore, concludes that the defendants as owners of lands riparian to the south half of Flathead Lake are entitled as a matter of law to access to the lake. Concomitant with that right of access is the right to wharf out to navigable water. Plaintiffs' motion for summary judgment is therefore denied. Defendants' motion for summary judgment is granted insofar as the existence of the riparian rights of access and wharfage are concerned.[27]

There remains for determination the question of whether any of the structures owned and maintained by the defendants constitute an abuse of their riparian rights. Plaintiffs contend that "at least some of the structures, including a building and a land-fill extending into the Lake, are not of the type permitted and exceed the limits normally held proper for riparian owners". This question cannot be resolved on the basis of the undisputed facts. As to this issue a further hearing will be required.

Defendants will prepare, serve and file a draft of partial summary judgment in conformance with this order.

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[26] Apparently defendants first received official notice of a claim of trespass in May, 1973. There may have been prior informal notice. The letters written by the Commissioner of Indian Affairs, upon which plaintiffs rely, were dated in 1955 and 1959, but as noted *supra*, neither letter expressly considered the question of riparian rights. In any event, there is nothing in the record to suggest any action by the Government or the Tribes prior to May, 1973.

[27] In view of this conclusion, it is unnecessary for the purpose of this order to consider the contention of the respective parties with respect to a temporary injunction or the sufficiency of plaintiffs' answer to some of defendants' interrogatories.

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

Civil No. 2343

[Filed, Entered and Noted Nov. 1, 1974. John E. Pederson, Clerk. By Dawna L. Nierstheimer, Deputy Clerk]

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al.,
*Plaintiffs,*

v.

JAMES M. NAMEN, et al.,
*Defendants.*

PARTIAL SUMMARY JUDGMENT

This cause came on to be heard on plaintiffs' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and upon motions to dismiss filed by defendants and intervenor, considered as motions for summary judgment, pursuant to Rules 12 (b) and 56 of the Federal Rules of Civil Procedure; and

The Court having considered the admitted facts, affidavits, and various exhibits stipulated into evidence; having heard oral argument; having found that there is no genuine issue as to any material fact with regard to the primary legal issue in this case of whether the defendants, as owners of property riparian to the south half of Flathead Lake, have the riparian rights of access and wharfage, but that, as to a secondary issue of whether any of the structures owned and maintained by the



defendants constitute an abuse of their riparian rights, further hearing and further development of facts are required; having concluded that defendants and intervenor are entitled to judgment as a matter of law on the primary issue; having entered a partial summary judgment to that effect on September 16, 1974; having thereby precluded plaintiffs from obtaining an injunction against construction of wharves, docks, or other obstructions below the highwater mark of Flathead Lake solely on the ground that the lakebed below that point is held by the United States in trust for the exclusive beneficial use of the plaintiff Tribes; and plaintiffs having indicated that they will seek an immediate appeal of the denial of their motion for summary judgment on the merits and the consequent denial of an injunction;

It is hereby ORDERED:

(1) That the Court's order of partial summary judgment entered September 16, 1974, is hereby vacated, and this order of partial summary judgment is hereby entered in lieu thereof;

(2) That the plaintiffs' motion for summary judgment is denied, and that summary judgment is entered in favor of the defendants and intervenor;

(3) That owners of lands riparian to the south half of Flathead Lake are entitled as a matter of law to access to the lake, with concomitant rights to wharf and/or dock out to navigable water;

(4) That, based on defendants' and intervenor's prevailing on this primary issue, injunctive relief in favor of plaintiffs is hereby denied; and

(5) That further proceedings which may be necessary before this Court on the secondary issue, abuse of riparian rights, are hereby stayed pending perfection of an appeal by plaintiffs and a decision on any such appeal.

DATED this 1st day of November, 1974.

/s/ William J. Jameson
WILLIAM J. JAMESON

United States District Judge



## APPENDIX D

Treaty Hell Gate, July 16, 1855, 12 Stat. 975

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, a treaty was made and concluded at the treaty ground, at Hell Gate, in the Bitter Root Valley, on the sixteenth day of July, eighteen hundred and fifty-five, between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the hereinafter named chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes and duly authorized thereto, by them, which treaty is in the words and figures following, to wit:

Articles of agreement and convention made and concluded at the treaty ground at Hell Gate, in the Bitter Root Valley, this sixteenth day of July, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes, and being duly authorized thereto by them. It being understood and agreed that the said confederated tribes do hereby constitute a nation, under the name of the Flathead

nation, with Victor the head chief of the Flathead tribe, as the head chief of the said nation, and that the several chiefs, headmen, and delegates, whose names are signed to this treaty, do hereby, in behalf of their respective tribes, recognise Victor as said head chief.

ARTICLE I. The said confederated tribes of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them, bounded and described as follows, to wit:

Commencing on the main ridge of the Rocky Mountains at the forty-ninth (49th) parallel of latitude, thence westwardly on that parallel to the divide between the Flat-bow or Kootenay River and Clarke's Fork; thence southerly and southeasterly along said divide to the one hundred and fifteenth degree of longitude, (115°,) thence in a southwesterly direction to the divide between the sources of the St. Regis Borgia and the Coeur d'Alene Rivers, thence southeasterly and southerly along the main ridge of the Bitter Root Mountains to the divide between the head waters of the Koos-koos-kee River and of the southwestern fork of the Bitter Root River, thence easterly along the divide separating the waters of the several tributaries of the Bitter Root River from the waters flowing into the Salmon and Snake Rivers to the main ridge of the Rocky Mountains, and thence northerly along said main ridge to the place of beginning.

ARTICLE II. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under the common designation of the



Flathead nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to wit:

Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse prairies; thence northerly to, and along the divide bounding on the west of Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent. And the said said confederated tribes agree to remove to and settle upon the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied if with the permission of the owner or claimant.

Guaranteeing however the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. *And provided*, That any substantial improvements heretofore made by any Indian, such as

fields enclosed and cultivated and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improvements of an equal value be made for said Indian upon the reservation; and no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of an equal value shall be furnished him as aforesaid.

ARTICLE III. *And provided*, That if necessary for the public convenience roads may be run through the said reservation; and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them; as also the right in common with citizens of the United States to travel upon all public highways.

The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said confederated tribes of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty the sum of one hundred and twenty thousand dollars in the following manner—that is to say: For the first year after the ratification hereof, thirty-six thousand dollars, to be expended under the direction of the President in providing for their removal to the reservation, breaking up and fencing farms, building houses



for them, and for such other objects as he may deem necessary. For the next four years, six thousand dollars each year; for the next five years, five thousand dollars each year; for the next five years, four thousand dollars each year; and for the next five years, three thousand dollars each year.

All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them, and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

ARTICLE V. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, an agricultural and industrial school, erecting the necessary buildings, keeping the same in repair, and providing it with furniture, books and stationery, to be located at the agency, and to be free to the children of the said tribes, and to employ a suitable instructor or instructors. To furnish one blacksmith shop, to which shall be attached a tin and gun shop; one carpenter's shop; one wagon and ploughmaker's shop; and to keep the same in repair, and furnished with the necessary tools. To employ two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades, and to assist them in the same. To erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures, and to employ two millers. To erect a hospital, keeping the same in repair, and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provide with the necessary furniture the buildings required for the

accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chiefs of the said confederated tribes of Indians are expected and will be called upon to perform many services of a public character, occupying much of their time, the United States further agree to pay to each of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such persons as the said confederated tribes may select to be their head chiefs, and to build for them at suitable points on the reservation a comfortable house, and properly furnish the same, and to plough and fence for each of them ten acres of land. The salary to be paid to, and the said houses to be occupied by, such head chiefs so long as they may be elected to that position by their tribes, and no longer.

And all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said tribes. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

ARTICLE VI. The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the



sixth article of the treaty with the Omahas, so far as the same may be applicable.

ARTICLE VII. The annuities of the aforesaid confederated tribes of Indians shall not be taken to pay the debts of individuals.

ARTICLE VIII. The aforesaid confederated tribes of Indians acknowledge their dependence upon the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of the annuities. Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the jurisdiction of the United States, the same rule shall prevail as that prescribed in this article, in case of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE IX. The said confederated tribes desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided that any Indian belonging to said confederated tribes of Indians who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE X. The United States further agree to guaranty the exclusive use of the reservation provided for

in this treaty, as against any claims which may be urged by the Hudson Bay Company under the provisions of the treaty between the United States and Great Britain of the fifteenth of June, eighteen hundred and forty-six, in consequence of the occupation of a trading post on the Pru-in River by the servants of that company.

ARTICLE XI. It is, moreover, provided that the Bitter Root Valley, above the Loo-lo fork, shall be carefully surveyed and examined, and if it shall prove, in the judgment of the President, to be better adapted to the wants of the Flathead tribe than the general reservation provided for in this treaty, then such portions of it as may be necessary shall be set apart as a separate reservation for the said tribe. No portion of the Bitter Root Valley, above the Loo-lo fork, shall be opened to settlement until such examination is had and the decision of the President made known.

ARTICLE XII. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chiefs, chiefs and principal men of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, Governor and Superintendent Indian Affairs W.T. [L.S.]

VICTOR, Head Chief of the Flathead Nation,
his x mark. [L.S.]

ALEXANDER, Chief of the Upper Pend d'Oreilles,
his x mark. [L.S.]

MICHELLE, Chief of the Kootenays,
his x mark. [L.S.]



AMBROSE, his x mark. [L.S.]
PAH-SOH, his x mark. [L.S.]
BEAR TRACK, his x mark. [L.S.]
ADOLPHE his x mark. [L.S.]
THUNDER, his x mark. [L.S.]
BIG CANOE, his x mark. [L.S.]
KOOTEL CHAH, his x mark. [L.S.]
PAUL, his x mark. [L.S.]
ANDREW, his x mark. [L.S.]
MICHELLE, his x mark. [L.S.]
BATTISTE, his x mark. [L.S.]

*Kootenays*

GUN FLINT, his x mark. [L.S.]
LITTLE MICHELLE, his x mark. [L.S.]
PAUL SEE, his x mark. [L.S.]
MOSES, his x mark. [L.S.]

James Dotty, Secretary.
R. H. Lansdale, Indian Agent
W. H. Tappan, Sub Indian Agent.
Henry R. Crosire,
Gustavus Sohon, Flathead Interpreter.
A. J. Hoecken, Sp. Mis.
William Craig.

And, whereas, the said treaty having been submitted to the Senate of the United States for their constitutional action thereon, the Senate did, on the eighth day of March, eighteen hundred and fifty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

"In Execution Session,
"Senate of the United States, March 8, 1859.

"*Resolved*, (two thirds of the senators present concurring,) That the Senate advise and consent to the rati-

fication of treaty between the United States and Chiefs, Headmen and Delegates of the confederate tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, who are constituted a nation under the name of the Flathead Nation, signed 16th day of July, 1855.

"Attest: "ASBURY DICKENS, Secretary."

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, one thousand and eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereunto caused the seal of the United States to be affixed, and have signed the same with my hand.

Done at the city of Washington, this eighteenth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of
[Seal.] the Independence of the United States, the eighty-third.

JAMES BUCHANAN.

By the President:

LEWIS CASS, Secretary of State.



## APPENDIX E

*General Allotment Act of Feb. 8, 1887, 24 Stat. 388.*

CHAP. 119.—An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided,* That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided,

the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further*, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided*, That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.



SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he

shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And, provided further*, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United



States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided however*, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further*, That its patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same

shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the



Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

SEC. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

SEC. 9. That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

SEC. 10. That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

Approved, February 8, 1887.

## APPENDIX F

*Act of April 23, 1904, 33 Stat. 302*

CHAP. 1495.—An Act For the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior be and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in article two of a certain treaty entered into by and between Isaac H. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, eighteen hundred and fifty-five.

SEC. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the reservation, under the provisions of the allotment laws of the United States.

SEC. 3. That upon the final completion of said allotments to said Indians, the President of the United States shall appoint a commission consisting of five persons to



inspect, appraise, and value all of the said lands that shall not have been allotted in severalty to said Indians, the said persons so constituting said commission to be as follows: Two of said commissioners so named by the President shall be two persons now holding tribal relations with said Indians—the same may be designated to the President by the chiefs and headmen of said confederated tribes of Indians, two of said commissioners shall be resident citizens of the State of Montana, and one of said commissioners shall be a United States special Indian agent or Indian inspector of the Interior Department.

SEC. 4. That within thirty days after their appointment said commission shall meet at some point within the boundaries of said Flathead Indian Reservation and organize by the election of one of their number as chairman. Said commission is hereby empowered to select a clerk at a salary not to exceed seven dollars per day.

SEC. 5. That said commissioners shall then proceed to personally inspect and classify and appraise, by the smallest legal subdivisions of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

SEC. 6. That said commission shall in their report of lands of the third class determine as nearly as possible the amount of standing saw timber on legal subdivisions thereof and fix a minimum price for the value thereof, and in determining the amount of merchantable timber growing thereon they shall be empowered to employ a timber cruiser, at a salary of not more than eight dollars per day while so actually employed, with such assistants

as may be necessary, at a salary not to exceed six dollars per day while so actually employed. Mineral lands shall not be appraised as to value.

SEC. 7. That said commissioners, excepting said special agent and inspector of the Interior Department, shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection and classification of said lands; such inspection and classification to be fully completed within one year from date of the organization of said commission.

SEC. 8. That when said commission shall have completed the classification and appraisement of all of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract under consideration, to locate other lands not occupied, not exceeding two sections in any one township, and such selections shall be made prior to the opening of such lands to settlement: *Provided*, That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six, or the lands selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner



in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *Provided further*, That the price of said lands shall be the appraised value thereof, as fixed by the said commission, but settlers under the homestead law who shall reside upon and cultivate the land entered in good faith for the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and no other and further charge of any kind whatsoever shall be required of such settler to entitle him to a patent for the land covered by his entry: *Provided*, That if any entryman fails to make such payments, or any of them, within the time stated, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and canceled: *And provided*, That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed by said commission, receiving credit for payments previously made.

SEC. 10. That only mineral entry may be made on such of said lands as said commission shall designate and classify as mineral under the general provisions of the mining laws of the United States, and mineral entry may also be made on any of said lands whether designated by said commission as mineral lands or otherwise, such classification by said commission being only prima facie evidence of the mineral or nonmineral character of the same: *Provided*, That no such mineral locations shall be permitted upon any lands allotted in severalty to an Indian.

SEC. 11. That all of said lands returned and classified by said commission as timber lands shall be sold and disposed of by the Secretary of the Interior under sealed bids to the highest bidder for cash or at public auction, as the Secretary of the Interior may determine, under such rules and regulations as he may prescribe.

SEC. 12. That the President may reserve and except from said lands not to exceed nine hundred and sixty acres for Catholic mission schools, church, and hospital and such other eleemosynary institutions as may now be maintained by the Catholic Church on said reservation, which lands are hereby granted to those religious organizations of the Catholic Church now occupying the same, known as the Society of Jesus, the Sisters of Charity of Providence, and the Ursuline Nuns, and said lands to be granted in the following amounts, namely, to the Society of Jesus, six hundred and forty acres, to the Sisters of Charity of Providence, one hundred and sixty acres, and to the Ursuline Nuns, one hundred and sixty acres, such lands to be reserved and granted for the uses indicated only so long as the same are maintained and occupied by said organizations for the purposes indicated. The President is also authorized to reserve lands upon the same conditions and for similar purposes for any other missionary or religious societies that may make



application therefor within one year after the passage of this Act, in such quantity as he may deem proper. The President may also reserve such of said lands as may be convenient or necessary for the occupation and maintenance of any and all agency buildings, substations, mills, and other governmental institutions now in use on said reservation or which may be used or occupied by the Government of the United States.

SEC. 13. That all of said lands classified as agricultural lands of the first class and agricultural lands of the second class and grazing lands that shall be opened to settlement under this Act remaining undisposed of at the expiration of five years from the taking effect of this Act shall be sold and disposed of to the highest bidder for cash, under rules and regulations to be prescribed by the Secretary of the Interior, at not less than their appraised value, and in tracts not to exceed six hundred and forty acres to any one person.

SEC. 14. That the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the lands, shall be expended or paid, as follows: One-half shall be expended from time to time by the Secretary of the Interior as he may deem advisable for the benefit of the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time that this Act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights

on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in section nine thereof, or expended on their account, as they may elect.

SEC. 15. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of Montana and for lands reserved for agency, school and mission purposes, as provided in sections eight and twelve of this Act, at the rate of one dollar and twenty-five cents per acre; also the sum of seventy-five thousand dollars, or so much thereof as may be necessary, the same to be reimbursable out of the funds arising from the sale of said lands to enable the Secretary of the Interior to survey the lands of said reservation as provided in section one of this Act.

SEC. 16. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent, in each township, and the reserved tracts mentioned in section twelve, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received. Approved, April 23, 1904.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-185**

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION, *et al.*,
*Petitioners,*

v.

JAMES M. NAMEN, *et al.*, AND THE CITY OF POLSON, MONTANA,
*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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James A. Poore, III
Of Counsel

October, 1976

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## QUESTION PRESENTED

Whether a United States patent conveying land riparian to a navigable lake to an Indian allottee grants to the allottee-patentee traditional riparian rights to erect docks and wharves to gain access to navigable waters.

## SUPPLEMENTARY STATEMENT OF THE CASE

The United States issued fee simple patents to Antoine Morais, a Flathead Indian, to land riparian to

Flathead Lake.[1] A portion of that riparian land with docks and wharves attached is now occupied by Respondents [2] and is used by them to gain access to the navigable waters of Flathead Lake.[3]

Petitioners instituted this case by filing a complaint which is reproduced as Appendix B. The complaint alleged Petitioners were the sole owners of the bed and banks of Flathead Lake below high-water mark. The relief requested that Respondents be declared trespassers and be ordered to remove all structures below high-water mark.

The issue presented to the District Court did not, as Petitioners contend, involve Indian control over docks and wharves, did not involve conflicting jurisdictional questions such as state jurisdiction over Indians or Indian lands, nor even Indian sovereignty or pseudo sovereignty over tribal lands,[4] and the question of whether the particular structures sought to be removed are reasonable *remains pending in the District Court.*[5]

The south half of Flathead Lake lies within the ex-

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[1] The patents are reproduced as Appendix A and are dated May 17, 1910, and preceded the Indian Reorganization Act of 1934, 48 Stat. 984, and the Indian Self-Determination and Education Assistance Act of 1975, Public Law 93-638.

[2] The land patented to Morais and now owned by Respondents is not just adjacent to Flathead Lake; it is riparian to Flathead Lake. *Confederated Salish & Kootenai Tribes, et al.,* v. *Namen, et al.,* 380 F. Supp. 452, 456 (D.Mont., 1974); Petitioners' Appendix B, p. 7a.

[3] 380 F. Supp., *supra,* at 456; Petitioners' Appendix B, pp. 7a-8a.

[4] The District Court carefully weeded out from its case analysis these so-called prime issues. 380 F. Supp., *supra,* at 462-463; Petitioners' Appendix B, pp. 20a-21a.

[5] 380 F. Supp., *supra,* at 467; Petitioners' Appendix B, p. 29a.



terior boundaries of the original Flathead Indian Reservation. Located within this south half of the lake are a number of islands, including Wild Horse Island and Cromwell Island.[6] Exhibit B, a map of the south half of Flathead Lake, reproduced as Appendix C, illustrates these two islands.

By the Act of April 23, 1904, and acts amendatory thereto, Congress "opened" the Reservation to the public.[7] The process of opening the Reservation entailed surveys, allotments to enrolled members of the Tribes, and various modes of patenting Reservation lands to non-Indians.[8] Under the Allotment Act of 1904,[9] non-Indians could obtain title to Reservation lands through townsites, homesteads, mineral locations, school lands, public sales, villa sites, and by purchasing from allottees their allotted lands. The Allotment Act of 1904 did not contemplate that any tribal or communal land would remain after the allotment and opening process was completed.[10] Island lands, such

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[6] "All lands on Wild Horse Island were conveyed under the Allotment Act of 1904 (33 Stat. 302) as amended." 380 F.Supp., *supra,* at 457; Petitioners' Appendix B, p. 8a.

[7] *Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation, Montana* v. *United States,* 437 F.2d 458 (Ct.Cl., 1971).

[8] 380 F.Supp., *supra,* at 459-461; Petitioners' Appendix B, pp. 13a-16a; Petitioners' Appendix F, pp. 50a-55a.

[9] 33 Stat. 302.

[10] The Allotment Act of 1904 was the method by which Congress authorized conveyance of once tribal land to Indians and non-Indians. Thus, the rule expressed in *Leavenworth, etc., R.R. Co.* v. *United States,* 92 U.S. 733, 742 (1876), is totally inapplicable. Rather, the basic principle established in *Buttz v. Northern Pac. Railroad,* 119 U.S. 55, 70 (1886), applies. The distinction between the two cases is carefully made in *Southern Pac. R.R. Co.* v. *Bell,* 183 U.S. 675, 680-681 (1902). Compare *Jones* v. *Meehan,* 175 U.S. 1, 20 S.Ct. 1, 4-6 (1899).

as Wild Horse Island and Cromwell Island, were disposed of in the same way.[11]

More than fifty years have elapsed since the Flathead Reservation was opened. Since that time, riparian owners have expended large sums of money to erect docks and wharves. The suit by Petitioners is the first instance in which they have judicially asserted exclusive right to the bed and banks as that right relates to the erection of docks and wharves.[12]

Reproduced as Appendices E and F, respectively, are the Senate Report and House Report urging adoption of the Allotment Act of 1904, and reproduced as Appendix G is a Brochure with attached map published by the Interior Department to promote sales of riparian lots offered for public sale pursuant to the Villa Sites Act.[13] Reproduced as Appendix H is the Interior Report urging adoption of the "Villa Sites Act." Each one of these documents reflects a congressional intent totally consistent with attaching riparian rights to riparian lands.

## REASONS FOR NOT GRANTING THE WRIT

The Petitioners did not institute this case to vindicate any regulatory or control process, nor did they institute this case to resolve questions of state versus federal or Indian jurisdiction within the Reservation. Rather, this case was instituted to establish in the Tribes exclusive title to all land and water below high-water mark and the right to remove all encroaching structures.

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[11] See footnote 6, supra.

[12] See Stipulation reproduced as Appendix D.

[13] Act of April 12, 1910; 36 Stat. 296-297, Section 23.



To establish this right, the Tribes ask this Court to overrule decisions articulating established rules of patent construction and to ignore well settled federal common law principles.

Since the early days of our federation, this Court has held firmly to the principle that federal grants-patents to former tribal-reservation lands are to be construed according to the laws of the state in which the Indian lands are located.

*State of Oklahoma* v. *State of Texas*, 258 U.S. 574, 594-595, 598 (1921); *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 88-89 (1922); *United States* v. *Champlin Refining Co.*, 156 F.2d 769, 773 (10th Cir., 1946), aff'd 331 U.S. 788-789 (1947); *United States* v. *Oklahoma Gas & Electric Co.*, 318 U.S. 206, 209-210 (1942); compare *Whitaker* v. *McBride*, 197 U.S. 510 (1904).[14]

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[14] The rule articulated in the cited cases has been consistently applied in similar controversies — some involving former Indian lands. See, e.g., *Hardin* v. *Shedd*, 190 U.S. 508, 509 (1902); *Shiveley* v. *Bowlby*, 152 U.S. 1, 45 (1894); *Hardin* v. *Jordan*, 140 U.S. 371 (1891); *Packer* v. *Bird*, 137 U.S. 661 (1891); *Choctaw & Chickasaw Nations* v. *Board of County Commissioners*, 361 F.2d 932, 933 (10th Cir., 1966); *Choctaw & Chickasaw Nations* v. *Seay*, 235 F.2d 39, 35 (10th Cir., 1956); *Herron* v. *Choctaw & Chickasaw Nations*, 228 F.2d 830, 832 (10th Cir., 1956); *United States* v. *Elliott*, 131 F.2d 720, 723 (10th Cir., 1942); *Shore* vs. *Shell Petroleum Corp.*, 55 F.2d 696, 902, aff'd 60 F. 2d 1, 2 (10th Cir., 1932); *United States* v. *Hayes*, 20 F.2d 873, 889-890 (8th Cir., 1927) cert.den 275 U.S. 555; *United States* v. *Heinrich*, 12 F.2d 938, 939 (D.-Mont., 1926). While as pointed out in *United States* v. *Oregon*, 295 U.S. 1, 27-28 (1935), the construction of federal grants is initially a federal question the federal courts traditionally defer to state rules of construction. Under state law, of course, Respondents would own the bank and shore to *low-water mark*. See, e.g., Section 67-712 and Section 89-601, Revised Codes of Montana, 1947; *Fawcette* v. *Dewey Lumber Co.*, 82 Mont. 250, 266 P. 646 (1928); *C. F. Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 201 P. 792 (1921); *Gibson* v. *Kelly*, 15 Mont. 417, 422, 39 P. 517 (1895).

The second principle which Petitioners seek to overrule establishes:

Federal patents of lands riparian to navigable waters convey the riparian right to wharf and dock out to navigable water. *Potomac Steamboat Co.* v. *Upper Pot. F. Co.*, 109 U.S. 672, 682-683 (1884); *Martin* v. *Std. Oil Co. of N.J.*, 91 U.S.App.D.C. 84, 198 F.2d 523, 526 (1952); *United States* v. *Belt*, 79 U.S.App. D.C. 87, 142 F.2d 761, 767 (1944); *Worthen Lumber Mills* v. *Alaska Juneau Gold Mining Co.*, 229 F. 966, 970 (9th Cir., 1916); *Dalton* v. *Hazelet*, 182 F. 561, 573 (9th Cir., 1910); *Decker* v. *Pacific Coast S. S. Co.*, 164 F. 974, 976 (9th Cir., 1908); *Columbia Canning Co.* v. *Hampton*, 161 F. 60, 64 (1908); *Ketchikan Spruce Mills* v. *Alaska Concrete Prod. Co.*, 113 F. Supp. 700, 701-702 (D.Alaska, 1953); *United States* v. *Groen*, 73 F.Supp. 713, 720 (D.D.C. 1947). See also *Whitaker* v. *McBride*, *supra*.

This principle is superimposed upon the federal common law doctrine which recognizes that the riparian right to dock and wharf out to navigable waters is one of the most valuable rights attaching to riparian land. *Dutton, et al.*, v. *Strong*, 1 Black 23, 31-33 (1861); *Railroad Company* v. *Schurmeir*, 7 Wall. 272, 287-289 (1868); *Yates* v. *Milwaukee*, 10 Wall. 497, 504 (1870); *United States* v. *River Rouge Improvement Co.* 269 U.S. 411, 418 (1926). Compare *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 318, 326 (1973).

Equally well established in the federal common law is the axiom: An express declaration of this riparian right in the conveyance itself would be redundant. *Illinois Central R. Co.* v. *State of Ill.*, 146 U.S. 387, 13 S.Ct. 110, 115 (1892).



## I.

Petitioners argue that the District Court ignored a fundamental proposition: Indian treaties and Congressional acts involving Indian rights must be liberally construed in favor of the Indians. Because the Ninth Circuit has federal jurisdiction over vast areas of Indian lands and a majority of American Indians, the Court is urged to grant review. Petitioners did not, however, seek a rehearing nor a hearing *in banc* to permit the appellate court the opportunity to further review its decision.[15]

However, the District Court neither ignored the rule requiring liberal construction in favor of the Indians, nor did it breach the rule.[16] Riparian rights had long been impliedly attached to federal conveyances in favor of Indians and their successors in interest.[17] The intention of Congress to convey tracts of reservation lands by townsites, homesteads, and mineral patents clearly carried with it the intention

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[15] Rule 35 (a) (2) and (b) and Rule 40, Rules of Appellate Procedure for the United States Court of Appeals.

[16] 380 F.Supp., *supra*, at 464-466; Petitioners' Appendix B, pp. 23a-27a.

[17] *Jones* v. *Meehan*, 175 U.S. 1, 20 S.Ct. 1 (1899). (Minnesota has declared the Red Lake River to be navigable. *Crookston Waterworks, Power & Light Co.* v. *Sprague*, 91 Minn. 461, 98 N.W. 347 (1904), rev'd on other grounds, 92 Minn. 57, 99 N.W. 420 (1905); *Arbol* v. *Grand Forks Lumber Co.*, 131 Minn. 186, 154 N.W. 968 (1915). See also *Fontenelle* v. *Omaha Tribe*, 430 F.2d 113 (8th Cir., 1970), and cases cited in footnote 14, *supra*.

In *Jones* v. *Meehan*, supra, 20 S.Ct. at 4-6, the Court, in recognizing that a grant of riparian land to an Indian chief carried with it dockage and wharfage rights, rejected a statutory restriction similar to 25 U.S.C. Section 177 because Congress had approved the Indian grant just as Congress, by the Allotment Act of 1904, 33 Stat. 302, authorized the Morais allotment.

to convey the concomitant riparian rights that customarily accompanied such patents or grants.[18]

The fact that allotted and homestead lands were located on islands within the south half of Flathead Lake evidences a clear intention to convey with the allotments and the patents riparian rights of dockage and wharfage.

Petitioners in essence assert the exclusive right to a strip of land between high water and the navigable waters of Flathead Lake. This Court characterized such a claim as anachronistic even when the competing parties were true sovereigns—states [19]—which, of course, Indian tribes are not.[20]

The argument that the doctrine of riparian rights was unknown to untutored Indians and that the doctrine could not be unfairly imposed upon them has also been subjected to analysis and rejected.[21]

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[18] *Sturr* v. *Beck*, 133 U.S. 541, 547 (1889); *Cruse* v. *McCauley*, 96 F. 369, 371, (Cir.Ct.D.Mont., 1899); see also 43 U.S.C., Section 661, 14 Stat. 253 (1856). Although the riparian rights doctrine had given way to the appropriation method of water right acquisition; nevertheless, where applicable, riparian rights impliedly attached to waters acquired in the process of locating minerals. See, e.g., *Atchison* v. *Peterson*, 20 Wall. 507, 511 (1874); *Schwab* v. *Bean*, 86 F. 41, 43-44 (C.C.A., Colo., 1898).

[19] *Commonwealth of Massachusetts* v. *State of New York*, 271 U.S. 65, 46 S.Ct. 357, 362 (1926).

[20] *Arizona* v. *California*, 373 U.S. 546, 597 (1963); *United States* v. *Kagama*, 118 U.S. 375, 381 (1886); as the District Court observed, Indian tribes are more nearly analogous to United States territories prior to statehood. 380 F.Supp., *supra*, at 462; Petitioners' Appendix B, pp. 19a-20a.

[21] *The Creek Nation*, 168 Ct.Cl. 269 (1965); *The Creek Nation* v. *United States*, 92 Ct.Cl. 269, 274-275; *United States* v. *Hayes*, 20 F.2d 873, 889, cert.den. 275 U.S. 555 (8th Cir., 1927).



## II.

The Court below neither indulged in balancing equities nor did it violate any rule of construction. The cardinal rule of construction which has been applied to Indian allotment patents and other federal patents is this:

> "Grants by the United States of its public lands bounded on streams or other waters, *navigable or nonnavigable*, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the land lies. As regards such conveyances, the United States assumes the position of a private owner, subject to the general law of the state. *Where it is disposing of tribal lands of Indians under guardianship, the same rules applies.*" *(United States* v. *Champlin Refining Co.*, 156 F.2d 769, 773 (10th Cir., 1946) aff'd 331 U.S. 788; emphasis supplied.)[22]

Of course, measured by state law, the ownership of the upland extends to low-water mark.[23]

Superimposed upon the above-quoted rule of Indian-patent-construction is also the principle that:

> "The riparian right (to dock and wharve out to navigable waters) attaches to land on the border of navigable water, *without any declaration to that effect from the former owner, and its designation in a conveyance by him would be surplusage.*" *(Illinois Cent. R. Co.* v. *Ill.*, 146 U.S. 387, 13 S.Ct. 110, 115 (1892); emphasis supplied; parenthetical words supplied.)

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[22] See also cases cited in footnotes 11 and 17, *supra*.

[23] See footnote 14, *supra*.

## III.

Federal courts have often implied and attached to patents of Indian lands rights which, at times, clearly resulted in Indians suffering a loss of tribal land or waters:

(1) Use of reservation waters for irrigation to a successor to an Indian allotment: *United States* v. *Powers*, 305 U.S. 527, 533 (1939); (2) ownership of submerged lands to the thread of the stream: *State of Oklahoma* v. *State of Texas*, 258 U.S. 574, 594 (1921); *United States* v. *Hayes*, 20 F.2d 873 (8th (Cir., 1927) cert.den. 275 U.S. 555; *The Creek Nation*, 168 Ct.C1. 269 (1965); (3) Mineral rights: *Choctaw & Chickasaw Nations* v. *Board of County Commissioners*, 361 F.2d 932, 933 (10th Cir., 1966); (4) Riparian right of accretion: *Fontenelle* v. *Omaha Tribe*, 430 F.2d 143 (8th Cir., 1970). In *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), this Court diminished and disestablished portions of a reservation through implications.[24]

## IV.

The Petitioners characterize the Court's recognition of admitted facts[25] as embracing a "balancing of equities" philosophy. However, a careful reading of the Court's decision reflects that the Court relied upon those facts along with legislative history and other facts only to establish that contemporaneous construc-

[24] The District Court recognized these same implications. 380 F.Supp., *supra*, at 465; Petitioners' Appendix B, p. 26a.

[25] See Appendix D.



tion of patents to Reservation lands included the riparian rights of dockage and wharfage.[26]

These are precisely the same type of facts this Court has relied upon to establish Congressional intent. See, e.g., *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975).

## V.

Petitioners argue that the District Court decision effectively precludes them from enjoying their exclusive fishing rights guaranteed by the treaty, relying principally upon *United States* v. *Winans*, 198 U.S. 371, 25 S.Ct. 662 (1905). However, even a casual reading of Judge Jameson's decision establishes that such a finding was neither expressed nor implied.[27] The Court actually held that the exclusivity of tribal title was burdened with the riparian right of dockage. The question of what rights of access to Flathead Lake were retained by the Tribe was not even touched upon.

Petitioners' reliance upon *Winans* is also misplaced because *Winans* re-established the supreme sovereignty the United States exercises over all lands within its boundaries[28] and in a reverse situation burdened the

[26] F.Supp., *supra*, at pp. 463, 465, 466; Petitioners' Appendix B, pp. 22a, 25a, 28a-29a.

[27] In *United States* v. *Pollman*, 364 F.Supp. 995 (D.Mont., 1973), Judge Jameson ruled that the Petitioners still possessed their exclusive fishing rights in Flathead Lake.

[28] Quoting from *Shiveley* v. *Bowlby*, 152 U.S. 1, the Court said: "'By the Constitution, as is now well settled, the United States having rightfully acquired the territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the territories, so long as they remain in a territorial condition. (Citing cases.)'" 25 S.Ct. at 665.

non-Indian's title with an access easement. Particularly apropos to this case is the following statement:

> "The extinguishment of the Indian title, opening the land for settlement, and preparing the way for future states, were appropriate to the objects for which the United States held the territory. And surely it was within the competency of the nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.' Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised." 25 S.Ct. at 665.

In granting Morais and others riparian land, Congress surely intended to convey "such easements as enable" the land to be enjoyed for its obvious purpose.

## CONCLUSION

The construction placed upon the Morais patent by the District Court is consistent with well established principles of federal law. No new precedent is created; no Indian policies violated. The District Court's decision, affirmed by the Ninth Circuit, contrary to Petitioner's assertion, does not pretend to limit Indian jurisdiction nor encroach upon Indian sovereignty. As the District Court said:

> "Thus, an analysis of the relevant case law firmly establishes two principles:
>
> "(1) In all other situations in which the Federal Government holds title to the beds and banks of navigable waters, a fee patent issued by the United States to riparian lands would include the rights of access and wharfage without an express provision in the patent. This was established



> as early as 1861 in Dutton v. Strong, *supra*, and consistently followed in many subsequent cases.
>
> "(2) Where the United States holds title in trust for Indian Tribes, federal common law is applicable to a determination of the extent of a federal grant despite the lack of any express Congressional language to that effect." 380 F.Supp., *supra*, at 466; Petitioners' Appendix B, p. 27a.

The Petition for Certiorari should be denied.

Respectfully submitted,

URBAN L. ROTH
Counsel for Respondents
Suite 400, Silver Bow Block
Butte, Montana 59701

POORE, McKENZIE, ROTH,
ROBISCHON & ROBINSON, P.C.
James A. Poore, III
Of Counsel

# APPENDICES

## APPENDIX A

Transcribed from Flathead County Records,
Book 116 Deeds, page 607

29484-10; 24859-10 1.0.; 1378.

THE UNITED STATES OF AMERICA.
TO ALL TO WHOM THESE PRESENTS
SHALL COME, GREETING:

WHEREAS, There has been deposited in the General Land Office of the United States an order of the Secretary of the Interior directing that a fee simple patent issue to Antoine Morais a Flathead Indian, for the Lot one and the east half of the Lot two of Section three in Township twenty-two North of Range Twenty West of the Montana Meridian, Montana, containing thirty-five and forty-two hundredths acres.

NOW KNOW YE, That the United States of America, in consideration of the premises, has given and granted, and by these presents does give and grant, unto the said Antoine Morais and to his heirs, the lands above described; To have and to hold the same, together with all rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging, unto the said Antoine Morais and to his heirs and assigns, forever. And there is reserved from the lands hereby granted a right of way thereon for ditchs or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the seventeenth day of May in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States the one hundred and thirty-fourth.

By the President: Wm. H. Taft
By M. P. LeRoy, Secretary
H. W. Sanford, Recorder of the
General Land Office

Recorded: Patent Number 130370
Re-recorded December 23-1912, Book 115-page 530

Recorded at request of F. L. Gray this 29th day of March 1911 at 12-15 o'clock p.m.

Fred S. Perry, County Recorder.
By J. R. Sauser, Deputy. No. 1123-

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Transcribed from Flathead County Records,
Book 118 Deeds, page 830
29484-10; 24639-10 1.0.; 1378.

THE UNITED STATES OF AMERICA.
TO ALL TO WHOM THESE PRESENTS
SHALL COME, GREETING:

WHEREAS, There has been deposited in the General Land Office of the United States an order of the Secretary of the Interior directing that a fee simple patent issue to Antoine Morais a Flathead Indian, for the Lot one and the east half of the Lot two of Section three in Township twenty-two North of Range Twenty West of the Montana Meridian, Montana, containing thirty-five and forty-two hundredths acres.

NOW KNOW YE, That the United States of Amer-



ica, in consideration of the premises, has given and granted, and by these presents does give and grant, unto the said Antoine Morais and to his heirs, the lands above described; To have and to hold the same, together with all rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging, unto the said Antoine Morais and to his heirs and assigns, forever. And there is reserved from the lands hereby granted a right of way thereon for ditchs or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the seventeenth day of May in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States the one hundred and thirty-fourth.

By the President: Wm. H. Taft
By M. P. LeRoy, Secretary
H. W. Sanford, Recorder of the
General Land Office.

(United States Land Office Seal)

Recorded: Patent Number 130370

Recorded at request of F. L. Gray this 23rd day of Dec. 1912 at 10:00 o'clock A.M.

Fred S. Perry, County Recorder. No. 4697
(Re-recorded on account of error in former deed, U.S. Land Office Seal omitted. See book 116, page 607 for former deed.)

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

Civil Action No. 2343
Filed: August 3, 1973
By N. P. Cronin, Deputy Clerk

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, AND HAROLD W. MITCHELL, JR., CHAIRMAN OF THE TRIBAL COUNCIL, ON HIS OWN BEHALF AND AS A REPRESENTATIVE OF THE CONFEDRATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA,

*Plaintiffs,*

v.

JAMES M. NAMEN, POLSON, MONTANA, BARBARA J. NAMEN, POLSON, MONTANA, A. J. NAMEN, KALISPELL, MONTANA, AND KATHRYN NAMEN, KALISPELL, MONTANA,

*Defendants.*

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### COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION AND DECLARATORY JUDGMENT

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The plaintiffs for their complaint allege as follows:

1. This Court has jurisdiction pursuant to 28 U.S.C. §1362, in that this action arises under the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975, be-



tween the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, and the United States of America, and upon the ground that this is an action by Indian tribes with a governing body duly recognized by the Secretary of the Interior.

2. This is an action for preliminary and permanent injunction and for a declaratory judgment, pursuant to 28 U.S.C. §2201, involving a question of actual controversy between the parties, as hereinafter more fully appears.

3. There is no adequate remedy at law.

4. The plaintiffs, Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (hereinafter referred to as the "Tribes"), are American Indian tribes organized pursuant to the provisions of the Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§461, *et seq.*, with a governing body duly recognized by the Secretary of the Interior.

5. Plaintiff Tribes sue on their own behalf.

6. Plaintiff Harold W. Mitchell, Jr., is an enrolled member of the Tribes, Chairman of the Tribal Council, the governing body of the Tribes, and sues as a representative of the Tribal Council and of the Tribes.

7. Defendant James M. Namen is sued in his individual capacity as an owner of the following described lands, Montana Principal Meridian E½ Lot 2, Section 3, Township 22 North, Range 20 West, and as the proprietor and doing business as Jim's Marina, Polson, Montana. Defendants Barbara J. Namen, A. J. Namen and Kathryn Namen are sued in their in-

dividual capacities as owners in common with James M. Namen of the above-described property.

8. Pursuant to the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975 (hereinafter referred to as the "Treaty"), the Tribes reserved from a grant of their aboriginal homelands to the United States, and the United States guaranteed the lands so reserved would remain as the Tribes' permanent home, a reservation within the boundaries of what now is the present State of Montana. The Reservation is known now as the Flathead Indian Reservation, Montana. The lands so reserved in the Treaty are described as follows:

> "Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse Prairies; thence northerly to, and along the divide bounding on the west the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning." (at 976)

The lands so reserved by the Tribes and established as a reservation by the Treaty include the south half of Flathead Lake. Title to the lands so reserved, including the banks and bed of the south half of Flathead Lake, is held by the United States in trust for the Tribes, unless expressly granted away by the United States through Congressional action subsequent to the Treaty.

9. By Article II of the Treaty, the United States



undertook to hold title to the reserved area, including the bed and banks of the southerly half of Flathead Lake, within the exterior boundaries of the Flathead Reservation, in trust for the Tribes. The United States continues today to hold title to the bed and banks of the southerly half of Flathead Lake below the line of the ordinary high water mark, such title held in trust for the Tribes. The beneficial ownership of the Tribes in the beds and banks of Flathead Lake have not been extinguished by the federal government.

10. Defendants are the owners, through successive conveyances, of portions of former Indian Allotment No. 1378, made to one Antoine Morais, pursuant to the Act of April 23, 1904, 33 Stat. 304, as amended, which allotment included the lands described above in paragraph 8.

11. Said allotment conveyed land to the allottee only to the high water mark of Flathead Lake, and the land below that point and under the bed of the lake was and is held by the United States in trust for the Tribes. The present owners of the former allotment could receive only what the allottee received, to wit, lands to the high water mark of Flathead Lake.

12. At the time of the allotment to Antoine Morais, the high water mark was at least at elevation 2893.2 feet and is at least at that point today.

13. Defendant James M. Namen, individually and as a proprietor of Jim's Marina, located in Polson, Montana, on a portion of the lands conveyed by Allotment No. 1378, is in trespass on lands held for the Tribes by virtue of buildings and structures which he has erected and maintained and continues to erect and

maintain which extend beyond the high water mark of 2893.2 feet and encroach on the banks and bed of Flathead Lake. Said defendant, although informed of the trespass, refuses to remove the building and structures.

WHEREFORE, the plaintiffs pray:

1. That defendants be enjoined *pendente lite* and permanently from proceeding in any manner whatsoever in further trespassing upon plaintiffs' lands;

2. That it be declared, ordered, adjudged and decreed that the defendants are in trespass upon plaintiffs' land to the extent that they maintain and have erected and maintained buildings and structures beyond the high water mark of elevation 2893.2 feet of Flathead Lake and encroach on the bed and banks of said Lake, and that defendants be directed to immediately remove all buildings and structures, including landfills, that extend beyond elevation 2893.2 feet of Flathead Lake and that the lands beyond elevation 2893.2 feet be restored to their original condiiton;

3. That defendants pay to plaintiffs the cost of this action; and

4. That plaintiffs have such other and further relief as is just and equitable.



Respectfully submitted,

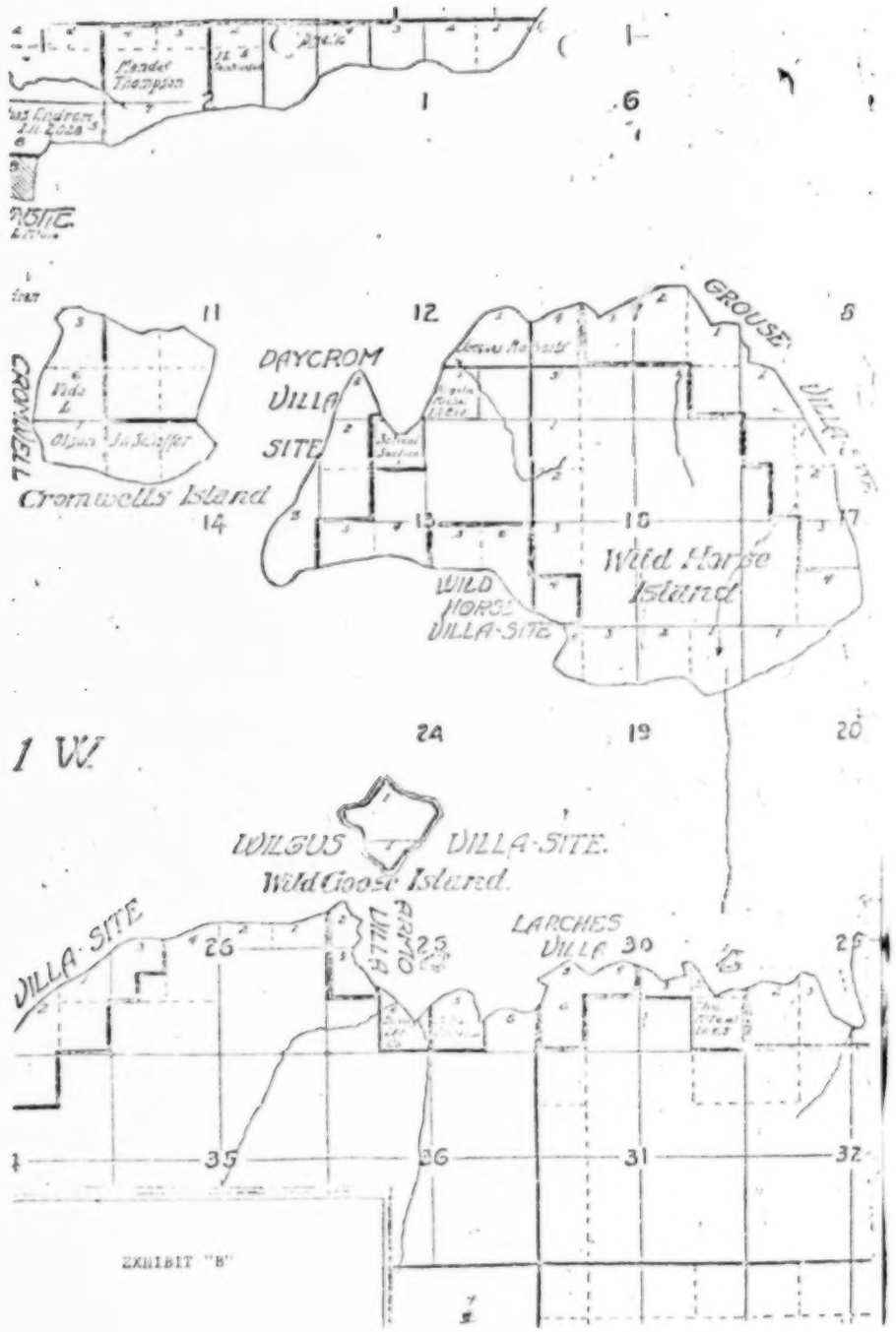
Signed: Richard A. Baenen/RUR
1735 New York Avenue, N.W.
Sixth Floor
Washington, D.C. 20006

Signed: Victor F. Valgenti/RUR
212 Missoula First Federal Building
Missoula, Montana 59801
*Attorneys for Plaintiffs*

## APPENDIX C


DAYTON
Dayton Creek
TOWNSITE
CROMWELL VILLA SITE
Cromu
Vida
Olson
5
4
3
8
9
10
7
15
T. 24 N.-R. 21 W.
29
28
27
32
33
34
BIG ARM VILLA-SI
BIG ARM TOWNSITE




Flandel Thompson
TOWNSITE
11
12
CROMWELL
Vida
Olson
Cromwells Island
14
DAYCROM VILLA SITE
GROUSE
VILLA-SITE
13
18
17
Wild Horse Island
WILD HORSE VILLA-SITE
1 W.
24
19
20
WILGUS VILLA-SITE.
Wild Goose Island.
VILLA-SITE
LARCHES VILLA
30
25
26
35
36
31
32
EXHIBIT "B"

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

No. 2343

Filed: November 1, 1974
John E. Pederson, Clerk
By: Dawna Nierstheimer, Deputy Clerk

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THE CONFEDERATED SALISH and KOOTENAI TRIBES, *et al*,

*Plaintiffs*,

v.

JAMES M. NAMEN, *et al*, and CITY OF POLSON, a Montana municipal corporation, Intervenor

*Defendants.*

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## STIPULATION

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IT IS HEREBY STIPULATED AND AGREED that Defendants and other riparian owners have expended large sums of moneys for the erection of docks and wharfs abutting their lands on the south half of Flathead Lake.

IT IS HEREBY STIPULATED AND AGREED that the above-entitled action is the first instance in which the Plaintiffs have judicially alleged exclusive rights to the bed and banks of Flathead Lake below highwater mark as that alleged right relates to the erection of docks and wharfs.



RICHARD A. BAENEN
By: /s/ Richard A. Baenen by UFV
*Attorney for the Plaintiff*

CHRISTIAN, McGURDY,
INGRAHAM & WOLD
By: /s/ F. L. Ingraham
*Attorneys for the Intervenor*

POORE, McKENZIE, ROTH,
ROBISCHON & ROBINSON
By: /s/ Urban L. Roth
*Attorneys for the Defendants*

## ORDER

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IT IS ORDERED that the facts above stipulated to are hereby made a part of the record in the above-entitled case.

DATED this 1st day of November, 1974.

Signed: William J. Jameson
District Judge

## APPENDIX E

HOUSE OF REPRESENTATIVES
58th CONGRESS, 2nd Session

Report No. 1678

# SURVEY, ETC., OF FLATHEAD INDIAN LANDS, MONTANA

March 17, 1904 — Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

MR. MARSHALL,
from the Committee on Indian Affairs,
submitted the following
REPORT

[To accompany H.R. 12231.]

The Committee on Indian Affairs, to whom was referred the bill (H.R. 12231) for the survey and allotment of lands now embraced within the Flathead Indian Reservation in the State of Montana, and the sale and disposal of all surplus lands after allotment, having had the same under consideration, submit the following report and recommend the passage of the bill with the amendments herein set forth.

In line 6, page 3, after the word "by," insert "the smallest."

In line 7, page 3, after the word "subdivisions," insert "of forty acres each."

In line 20, page 3, strike out the word "six" and insert the word "eight."



After the word "employed," in line 20, insert "with such assistance as may be necessary, at a salary not to exceed six dollars per day while so actually employed."

In line 23, page 3, after the word "agent," insert "and inspector."

On page 4, line 17, after the word "occupied," insert "not exceeding two sections in any one township."

On page 6, line 24, after the word "cash," insert "or at public auction, as the Secretary of the Interior may determine."

On page 7, line 13, strike out the word "only."

On page 8, line 6, strike out the words "at public auction."

On page 8, line 16, strike out the words "excepting the" and in lieu thereof insert the word "and."

In line 24 strike out the word "give" and insert the word "aid;" and also strike out the word "a."

In line 25 strike out the word "start;" also the words "the pursuit of;" also the word "or," and insert in lieu thereof "and."

On page 9, line 3, strike out the words "time that this act shall take effect" and insert in lieu thereof the words "date of the proclamation provided for in section nine hereof."

In line 14, after the word "necessary," insert "the same to be reimbursable out of the funds arising from the sale of said lands."

By the treaty with the Flathead Indians, made by

Governor Stevens when this reservation was set aside, it was expressly provided:

> ART. 6. The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

The article in the Omaha treaty referred to expressly provides for the sale of all of the surplus lands, paying the proceeds to the Indians.

There are included in this reservation about 1,450,000 acres of land. It is estimated that 100,000 acres will cover the allotments for all Indians on the reservation, leaving 1,350,000 acres for settlement. Some of the most fertile lands in the State of Montana are embraced within this reservation and are now lying idle and unoccupied.

By the terms of the bill all of these lands are to be appraised by a commission of five persons, two of whom shall be members of this tribe, two of whom shall be citizens of the State of Montana, and one a special agent of the Indian Bureau.

All of the proceeds of sales, except the expense of administering this trust, go to the Indians themselves. We believe no fairer plan can be devised to protect every right of the Indians. The United States, under the terms of this bill, acts as trustee only, and assumes no liability. No appropriation is called for,



except for the payment of sections 16 and 36 at $1.25 per acre, the same to be ceded to the State of Montana for school purposes, in accordance with the enabling act of Montana, which will require not to exceed $100,000.

The Department of the Interior recommends the passage of the bill.

Appended hereto is a letter from the honorable Secretary of the Interior relative to H.R. 8324, which is substantially the same as the present bill, it having been amended in accordance with the recommendations of the Department.

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Department of the Interior
Washington, January 13, 1904

Sir: I am in receipt of your letter of the 13th instant, inclosing H. R. 8324, being a bill "for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation in the State of Montana, and the sale and disposal of all surplus lands after allotment," and asking for a report on the same.

In reply I would state that it has been the desire of the Department for some time to take steps to allot the Indians of the Flathead Reservation upon tracts of land in severalty, to make provisions for the irrigation of their allotments, where needed, and to place all the Indians on the reservation in a position to improve their condition and support themselves, and with certain amendments which are indicated and set out below, I believe that these objects can be accomplished by the proposed bill, if enacted into law, viz:

Section 2.—In line 4 of page 2 the words "now holding tribal relations" should be stricken out and the words "having tribal rights" substituted therefor. The language employed in the bill as it now stands is thought to be somewhat ambiguous, and if amended as indicated the rights of any persons as Indians on said reservation if questioned may be determined by the Interior Department in the usual manner.

In line 8 of page 2, after the word "Reservation," insert the words "including the Lower Pend d'Oreille or Calispel Indians now on the reservation." This amendment is deemed to be very necessary in order to fix the status of this band of Indians upon the Flathead Reservation, which is now very doubtful and open to question. In the spring of 1887 the Northwest Commission concluded agreements with the Indians of the Flathead Reservation and the Indians known as the Lower Pend d'Oreille or Calispels residing along the Calispel River in eastern Washington, by the terms of which the latter Indians were to remove to the Flathead Reservation. In anticipation of the ratification of this agreement about one-half of said Calispels under Chief Michael (Michel), removed to the reservation. The other half never removed and are still in the vicinity of their old home in Washington. These two agreements were duly submitted to Congress, but for some reason (unknown to the office) they were never ratified. The necessity for fixing the status of the Calispels now on said Reservation will therefor be apparent.

Section 3.—The Department believes that the work of classifying and appraising the lands of the said reservation can be equally as well accomplished by a



commission of three persons as by one consisting of five. It is therefore recommended that in line 12 of page 2, the word "five" be stricken out, and the word "three" substituted therefor, and that lines 16 to 22 be stricken out and the following substituted in lieu thereof: "One of said commissioners so named by the President shall be an Indian having tribal rights on the Flathead Reservation, such commissioner to be designated by the chiefs and headmen of said confederated tribes of Indians; one of said commissioners shall be a resident citizen of the State of Montana; and the third commissioner shall be a United States special Indian agent or Indian inspector of the Interior Department."

Section 4.—In line 3 of page 3, it is recommended that the word "seven" be stricken out and the word "five" substituted therefor, so as to provide for a salary for the clerk to said commission at $5 per day instead of $7. It is believed that $5 per day will be ample to secure the services of a competent clerk to prform the duties required.

Section 5.—In line 5 of page 3, after the word "appraise," it is suggested that the words "by legal subdivisions" should be inserted, and it is so recommended.

Section 6.—The first clause of this section fixes a maximum limit at which said commission may appraise the several classes of land. The department is emphatically of the opinion that no such limit should be fixed, but that the appraisals should be placed at their real evaluation as to each of the different classes of lands. It is therefore recommended that lines 13,

14, 15, 16, and 17, and all excepting the word "said," in line 18, be entirely eliminated and stricken out.

It is also believed that the timber lands should have the timber thereon estimated by legal subdivisions instead of 160-acre tracts. It is therefore recommended that in line 21, page 6, the words "legal subdivisions be substituted for the words "subdivisions of one hundred and sixty acres thereof."

Section 7.—In line 5 of page 4 the word "each" should be added after the words "per day" so as to provide for a per diem of $10 for each of the two commissioners, excepting the special agent or inspector. Also in line 7 on page 4 the word "complete" should be "completed."

Section 8.—In line 11 of page 4 the words "such classification and appraisement" should be stricken out and the words "the same" inserted. Also in line 12 of page 4 the word "same" should be stricken out and the word "land" inserted therefor.

In line 22 of page 4 the words "herein ceded" should be stricken out and the words "under consideration" substituted therefor. The Flathead Indians have not agreed to any cession of the lands comprising their reservation and no such cession is contemplated.

The provision in section 8 as to payment by the United States for the State school lands is not perfectly clear and makes no provision as to the price per acre to be paid. It is recommended that in lines 22 and 24 of page 4, and line 1 of page 5, the words "which shall be paid for by the United States as herein provided in a quantity equal to the loss, and" be eliminated and stricken out, and that the following



proviso be added at the end of the section, line 2, page 5, as follows: "Provided, That the United States shall pay to said Indians for the lands in said sections 16 and 36, or the lands selected in lieu thereof, the price per acre at which the same are appraisd by the aforesaid commission."

Section 9.—The provision regarding the proclamation of the President opening the surplus lands appears to be somewhat ambiguous as it now stands. It is suggested that after the word "prescribe," in line 5 of page 5, the words "the time when and" be inserted, and that in lines 9, 10, and 11 the phrase "until after the expiration of sixty days from the time when the same are open to settlement and entry" be stricken out.

The Department is of the opinion that the provision in reference to the payments to be made by settlers on said lands should be changed so as to require a larger cash payment at the time of entry. It is therefore recommended that the words "the appraised value thereof in five annual payments annually in advance," lines 21 and 22, page 5, should be stricken out, and the following words substituted therefor: "One-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments to be paid one, two, three, four and five years, respectively, from and after the date of entry." The words "in advance," in line 24, same page, should be stricken out.

The provision in lines 8, 9, 10, 11, page 6, authorizing the Secretary of the Interior to excuse a settler for failure to make the required payments to defer the same, should be entirely eliminated. From past ex-

perience I am convinced that if the Indians are to receive the full valuation for their lands and to receive it promptly, that no permission should be granted to any settler to defer the time of making payments.

Section 10.—At the end of this section, line 19, page 6, the following provision should be added: "Provided, That no such mineral locations shall be permitted upon any lands allotted in severalty to an Indian." To permit mineral locations to be made upon the lands allotted to Indians will only invite future trouble for the allottee, and in their behalf and for their protection no such location should be permitted under any circumstances.

Section 11.—This section should be amended by inserting, after the words "Secretary of the Interior," in line 22, page 6, the words "under sealed bids." Full prices for such timber lands and fair competition can best be secured by disposing of the same under sealed bids.

Section 12.—It is recommended that the words "six hundred and forty" should be substituted for the words "three hundred and twenty" in line 25, page 6, and that after the word "Jesus" in line 6, page 7, the words "such lands to be reserved for the uses indicated only so long as the same are maintained and occupied by said society for the purposes indicated" be added.

It is recommended further that the following clause be inserted after the addition last mentioned. "The President is also authorized to reserve lands upon the same conditions and for similar purposes, for any other missionary or religious societies that may make



application therefor within one year after the passage of this act, in such quantity as he may deem proper."

Section 13.—In line 19, page 7, the words "one dollar and twenty-five cents per acre" should be stricken out, and the words "their appraised value" substituted therefor, and it is so recommended.

There can be no justification for selling lands at $1.25 per acre that are appraised at $3 or $4 per acre, or perhaps more. There is no doubt but that lands which remain unentered by homesteaders with the requirement of settlement and residence for five years annexed, might readily sell for their appraised price without such requirements and in tracts of 320 acres. If it should happen that any of the tracts are appraised too high to secure purchasers or entrymen, then provision should be made for a reappraisement. Under no conditions should the price of sale be reduced below the appraised value.

Another point should be noted in this connection, and that is the probability that prospective settlers would be deterred from entering the lands at the appraised value, should they know, as proposed in the bill, that at some future time the lands might be procured at perhaps one-third or one-half the appraised price. A practical illustration of such a condition was afforded in connection with the opening of the Great Sioux Reservation in Dakota, by the act of March 2, 1889 (25 Stat. L., p. 888).

Section 14.—Strike out the whole of section 14 and insert as follows:

"Sec. 14. That the proceeds received from the sale

of said lands in conformity with this act shall be paid into the Treasury of the United States, and, after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, excepting the expenses of the survey of the lands, shall be expended or paid annually as they accrue, as follows: One-half shall be expended by the Secretary of the Interior, as he may deem advisable, for the benefit of said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Calispels thereon at the time that this act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to give the Indians a start in the pursuit of farming or stock raising, and the remaining half to be paid to the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Calispels thereon at the time that this act shall take effect, or expended on their account, as they may elect."

Section 15.—It is recommended that the following be substituted for section 15 of said bill:

"That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, such sum as may be necessary to pay for the lands granted to the State of Montana, and for lands reserved for agency, school, and mission purposes, as provided in sections 8 and 12 of this act, at their appraised valuation; also the sum of seventy-five thousand dollars, or so much thereof, as may be necessary, to enable the Secretary of the Interior to survey the lands of said reservation, as provided in section 1 of this act."



In connection with the aforesaid proposed item for State school lands, the Department has to say that it would be impossible, in advance of the survey and appraisement of said lands, to estimate, even approximately, the value of such school lands. The reservation contains, it is now estimated, about 1,433,000 acres. One eighteenth of this, which is to be donated to the State, would be about 80,000 acres. As it is believed that the average value of those lands will be considerably more than $1 per acre, it will be seen that the proposed appropriation of $90,000, as provided in said bill, would in any event be insufficient.

Section 16.—In line 15, page 9, after the word "township," insert "and the reserved tracts mentioned in section 12."

Section 17.—This section provides for the consent of the Indians to the provisions of the bill before the same shall become effective. The bill if amended as above recommended, will fully safeguard and protect the rights and interests of the Flathead Indians, and there is no occasion for presenting the matter to the Indians for the purpose of procuring their consent thereto. It is accordingly recommended that said section 17 be entirely stricken out.

Very Respectfully,

E. A. Hitchcock, Secretary.

The Chairman of the Committee on Indian Affairs,
House of Representatives.

## APPENDIX F

SENATE

58th CONGRESS, 2d Session

Report No. 1930

# FLATHEAD INDIAN RESERVATION LANDS.

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April 7, 1904 — Ordered to be printed.

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MR. STEWART,
from the Committee on Indian Affairs,
submitted the following
REPORT.
[To accompany H. R. 12231.]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 12231) for the survey and allotment of lands embraced within the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment, having had the same under consideration, submit the following report and recommend the passage of the bill without amendment:

By the treaty with the Flathead Indians, made by Governor Stevens when this reservation was set aside, it was expressly provided that the President should cause the lands to be surveyed, the necessary lands alloted to the Indians, and all the surplus lands sold for their benefit. The present bill merely provides the necessary means for carrying the agreement with the Indians into effect.

We believe that the provisions of this bill in creating a commission to be named by the President for



the classifying and appraising of these lands, consisting of two Indians now holding tribal relations with the said Indians, two citizens of the State in which the lands are situated, and one special agent of the Indian Bureau, is a most just and equitable provision and one that will meet with the approbation of all friends of the Indians in fully protecting their interests.

These Indians now inhabiting said Flathead Reservation are far advanced in civilization and are anxious for the early carrying into effect of the wise and equitable provisions of this act.

It is estimated that less than 100,000 acres of these lands will be more than sufficient to allot all Indians now on the reservation and that about 1,350,000 acres of land will be thrown open for settlement lands.

The bill provides that the commission shall segregate all timber lands, which shall be sold from time to time by the Secretary of the Interior under such regulations as he may prescribe. The agricultural lands are to be opened for homestead settlement only, the settlers paying the appraised price of the lands settled upon.

At the expiration of five years such waste and grazing lands as may then remain unsettled may be sold by the Secretary of the Interior under such regulations as he may prescribe.

The United States Government only acts herein as trustee for the Indians.

We believe this bill to be most meritorious, just, and equitable and recommend its passage without amendment.

The honorable Secretary of the Interior and the honorable Commissioner of Indian Affairs both recommend the passage of the bill.

Attached hereto is the report of the House Committee on Indian Affairs, with the report from the honorable Secretary of the Interior on the original House bill, which was amended in accordance with his recommendations.

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(See attached Appendix E for report of the House Committee on Indian Affairs, with attached report from the Honorable Secretary of the Interior, E. A. Hitchcock.)



## APPENDIX G

### REGULATIONS FOR THE SALE OF THE VILLA-SITE LOTS AROUND FLATHEAD LAKE IN THE FORMER FLATHEAD INDIAN RESERVATION, MONT.

Department of the Interior
Washington, March 20, 1915

The Commissioner of the General Land Office.

Sir: Under the provisions of the act of April 12, 1910 (36 Stat., 296), you are directed to cause the lots surveyed as villa sites around Flathead Lake, in the former Flathead Indian Reservation, Mont., to be offered for sale at Polson, Mont., at public outcry, under the supervision of the superintendent of opening and sale of Indian lands, at not less than $10 per acre, beginning on July 26, 1915, and continuing thereafter from day to day as long as may be necessary, Sundays and holidays excepted, in the manner and under the terms hereinafter prescribed.

*Manner*—Bids may be made either in person or by agent, but not by mail nor at any time or place other than the time and place when the lots are offered for sale hereunder, and any person may purchase any number of lots for which he is the highest bidder. Bidders will not be required to show any qualifications as to age, citizenship, or otherwise. If any successful bidder fails to make the payment required on the date of the sale, the lot awarded to him shall be reoffered for sale on the following day.

*Terms*—Payments will be required as follows: No lot will be disposed of for less than $10 per acre, and

at least 25 per cent of the bid price of each lot sold must be paid on the date of the sale and the remainder, if the price bid is $50 or less, within one year from the date of sale; if the price bid be over $50 and less than $100, 75 per cent of the cost may be divided into two equal payments, due, respectively, one and two years from the date of the sale; if the price bid be $100 or more, the 75 per cent remaining unpaid may be divided into three equal payments, due, respctively, one, two, and three years from the date of sale. No entry will be allowed until payment has been made in full for the lot, but in case of partial payment the register will issue a non-transferrable memorandum duplicate certificate showing the amount of the bid and the terms of the sale, and reciting the right of the the purchaser to make entry upon completing the payments; the receiver in such case will issue a memorandum receipt for the money paid. Nothing herein will prevent the transfer of the interests secured by the purchase and the partial payment of the lot, by deed, but the assignee will acquire no greater right than that of the original purchaser, and the final entry and patent will issue to the original purchaser when all payments are made. All lots affected by the easement provided for in the act of April 24, 1912 (37 Stat., 527), as shown upon the approved plats of said lots, will be sold subject to said easement.

*Forfeiture*—If any person who has made partial payment on the lot purchased by him fails to make any succeeding payment required under these regulations at the date such payment becomes due, the money deposited by such person for such lot will be forfeited, and the lot, after forfeiture is declared,



will be subject to disposition as provided in said act. Lots remaining unsold at the close of sale, or thereafter declared forfeited for nonpayment of any part of the purchase price under the terms of the sale, will be subject to future disposition at public sale at such time and place as may thereafter be provided. All persons are warned against forming any combination or agreement which will prevent any lot from selling advantageously, or which will in any way hinder or embarrass the sale, and all persons so offending will be prosecuted under section 2373 of the Revised Statutes of the United States, which reads as follows:

> "Every person who, before or at the time of the public sale of any of the lands of the United States, bargains, contracts, or agrees, or attempts to bargain, contract, or agree, with any other person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof, or who by intimidation or unfair management hinders or prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale, shall be fined not more than one thousand dollars or imprisoned not more than two years, or both."

The superintendent of the opening and sale of Indian lands will be, and he is hereby, authorized in his discretion to fix for any lot a greater minimum price per acre than $10, and he may reject any and all bids for any lot, and at any time suspend, adjourn, or

postpone the sale of any lot or lots to such time and place as he may deem proper.

Very respectfully,

A. A. Jones,
First Assistant Secretary.

FLATHEAD LAKE, MONTANA,

Is situated near to and slightly southwest of the Glacier National Park, the region of eternal ice, which may be reached by automobile from the lake in about three hours. The lake is in a valley 15 miles wide and 30 miles long, between ranges of the Rocky Mountains of scenic beauty, whose slopes are covered with fir, larch, and pine trees. The lake has an area of approximately 360 square miles. The Flathead National Forest lies north, west, and east of the valley. The lake and streams abound in fish, and hunting is excellent. The lake is utilized for bathing, sailing, boating, and yachting, and several steamboats ply between the various towns upon its borders. The shores are well adapted for boat landings and the erection of wharves.

The lands abutting the north half of the lake were disposed of many years ago, and numerous homes and fruit orchards have been established thereon. The south half of the lake is within the former Flathead Indian Reservation. The climate is delightful, the themometer ranging from about zero to 75° or 80° above. Apples, pears, cherries, peaches, and small fruits of the finest quality are raised upon lands bordering upon the lake, many without irrigation.

Twenty-one groups of villa sites fronting on said lake have been surveyed into 905 lots or villa sites



for disposition, and a sale of such portion thereof as the demand may warrant will take place in accordance with the regulations hereto attached. The lots contain not less than two or more than five acres.

These villa sites are not only well adapted for summer villas for persons of wealth but for permanent homes for persons of moderate means and for fruit raising. Good roads, adapted to automobile use, skirt the shores of the lake.

The location of the groups of villa sites is shown upon the above plat, and the name of each group and the number of villa sites are are follows:

| *Name* | *Lots* | *Name* | *Lots* |
|---|---|---|---|
| Alson | 14 | Larches | 18 |
| Armo | 11 | Matterhorn | 54 |
| Baptiste | 20 | Narrows | 5 |
| Big Arm | 64 | Orchard | 44 |
| Blue Grade | 40 | Pollard | 24 |
| Cromwell | 31 | Safety Bay | 181 |
| Daycrom | 43 | Station | 10 |
| Featou | 79 | White Swan | 61 |
| Finley Point | 32 | Wild Horse | 29 |
| Grouse | 93 | Wilgus | 17 |
| Island | 3 | | |

The sale will begin at Polson on July 26, 1915, and continue at such other places as may be selected by the superintendent of sale. Polson may be reached from Kalispell either from east or west by lake shore. Automobile stages run daily from Polson on the lake to Ravalli, on the Northern Pacific Railway, and from Elmo, on the lake, to Plains, on said railway, via Camas Hot Springs. Trains from Kalispell, on the

Great Northern Railway, connect at Somers for the morning trips of the steamers over the lake to Polson, and from Somers to Big Arm by way of Dayton, Elmo, and many other wharf landings on the western shore. Stop-over privileges can be obtained at Missoula, on the Chicago, Milwaukee & St. Paul Railway, and the lake be reached by automobile stage. The Canadian Pacific Railway will also allow stop-over privileges at Elko, Fernie, or Michel, British Columbia, on tourist tickets, from which points connections can be made with the Great Northern Railway to Somers, on the lake.

Plats of the 21 villa sites will be on file in the following United States land offices: Billings, Bozeman, Glasgow, Great Falls, Havre, Helena, Kalispell, Lewistown, Miles City, and Missoula, Mont.; Denver, Colo.; Cheyenne, Wyo.; Bismarck, N. Dak.; Pierre, S. Dak.; Sante Fe, N. Mex.; Phoenix, Ariz.; Salt Lake City, Utah; Carson City, Nev.; Spokane and Seattle, Wash.; Portland, Oreg.; and Los Angeles and San Francisco, Cal. A set of the plats will also be on file with the United States Reclamation Service, room 802 Post Office Building, Chicago, Ill. These plats will be subject to inspection without charge.

Through the courtesy of the Post Office Department, complete sets of the above plats of villa sites may be examined in the post offices at New York, Philadelphia, Boston, Pittsburgh, Atlanta, and New Orleans.



## APPENDIX H

SENATE
61st CONGRESS, 2d Session

REPORT NO. 117

# SURVEY, ALLOTMENT, ETC., OF LANDS IN FLATHEAD INDIAN RESERVATION, MONT.

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January 26, 1910 — Ordered to be printed.

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MR. DIXON,
from the Committee on Indian Affairs,
submitted the following
REPORT.
[To accompany S. 3983]

The Committee on Indian Affairs, to which was referred Senate bill 3983, entitled "A bill to amend the act of April twenty-third, nineteen hundred and four (Thirty-third Statutes at Large, page three hundred and two), entitled 'An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment,' and all amendments thereto," beg leave to report the same back to the Senate with the recommendation that the bill do pass with amendments.

The Flathead Indian Reservation has been surveyed and allotments made to all of the Indians holding tribal relations with the Flathead Indians. The bill in question proposes to survey and sub-divide into small lots for summer-residence sites the entire unallotted lands fronting on Flathead Lake, the pro-



ceeds from the sale of these lots to be used in furthering the reclamation of the allotted Indians' lands which is now being carried on. The lands fronting on this lake are of little agricultural value, and it is believed that a large amount of money can be realized from the sale of the lake frontage; much more than can be realized under the present status of these lands, opening them to settlement. The bill also provides that, where Indian allotments are irrigated, that the Secretary of the Interior may, upon the application of the Indian allottee, sell a portion of his allotment, retaining in all cases a sufficient amount of land for actual cultivation by the allottee. The bill also provides for an exchange of allotments where the allotments already made fall under the reservoir sites that are needed in the construction of the irrigation projects. Your committee is of the unanimous belief that the proposed legislation is most meritorious and for the benefit of the Flathead Indians.

The bill in question was referred to the Secretary of the Interior for a report, which is attached hereto, marked Exhibit "A," and made a part hereof.

Amend the bill by striking out all of the original bill, except the enacting clause, and inserting in lieu thereof the following:

> That the act of April twenty-third, nineteen hundred and four (Thirty-third Statutes at Large, page three hundred and two), entitled "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana," and all amendments thereto, be amended by adding thereto the following sections:
>
> "Sec. 23. That the Secretary of the Interior be,

and he is hereby, authorized to immediately cause to be surveyed and subdivided into lots, not less than two acres and not more than five acres in area, all of the unallotted land fronting on Flathead Lake, in the State of Montana, that are embraced within the limits of the Flathead Indian Reservation, whether classified as grazing, agricultural, or timberlands.

"That when said lands are so surveyed and subdivided into lots as aforesaid, the Secretary of the Interior shall sell the same to the highest bidder, either at public sale or under sealed bids, as in his judgment he shall deem best for the interest of the confederated tribes of the Flathead, Kootenai, and Upper Pend d'Oreille Indians, the proceeds from the sale of said lands, after deducting the expenses of the survey and sale of the lands, shall be paid into the Treasury of the United States and expended as heretofore provided in section fourteen, as amended by the act of May twenty-ninth, nineteen hundred and eight.

"Sec. 24. That where allotments of lands have been made in severalty to said Indians from the lands embraced within the area of said Flathead Indian Reservation, which are or may be irrigable lands, the Secretary of the Interior may, upon application of the Indian allottee, sell and dispose of not to exceed sixty acres of such individual allotment of land, under such terms and conditions of sale as the Secretary of the Interior may prescribe, one-half of the proceeds of the sale of said individual allotment to be paid to the Indian allottee and the remaining half of the proceeds of sale to be held in trust for the said Indian allottee, upon which he shall be paid annually not less than three per centum interest, the remaining principal sum to be paid to said allottee or his heirs when the full period of his trust patent for the remaining lands covered by his allotment shall



have expired, or sooner, should the Secretary of the Interior, in his judgment, deem it best for said Indian allottee.

"And in the event of the failure, neglect, or refusal of any such allottee to relinquish any allotment made to him on any land reserved or necessary for reservoir sites, as aforesaid, the Secretary of the Interior is authorized to bring action under the provision of the laws of the State of Montana to condemn and acquire title to any and all lands necessary or useful for said reservoir sites that have heretofore been allotted on said Flathead Indian Reservation lands."

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## EXHIBIT A

## DEPARTMENT OF THE INTERIOR

*Washington, January 17, 1910.*

Sir: I have the honor to acknowledge the receipt, by your reference, of a copy of Senate bill No. 3983, Sixty-first Congress, second session, amending the act of April 23, 1904 (33 Stat. L., 302), entitled "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment," and all amendments thereto, by authorizing the sale and disposal of the unallotted lands fronting on Flathead Lake in areas of not less than 2 nor more than 5 acres as summer residence sites to the highest cash bidder, and the sale and disposal of not to exceed 60 acres of any allotment on irrigable lands on application by the Indian allottee.

The department is of the opinion that a larger sum will be procured from the sale of the unallotted lands bordering Flathead Lake in areas of from 2 to 5 acres for summer-residence sites than

from their sale as provided in section 8 of the act of April 23, 1904, supra. It is believed, however, that the proceeds derived from the sale of these lands should be subject to the same disposition as is provided for the proceeds derived from other surplus lands by section 14 of the act of April 23, 1901, supra, as amended by the act of May 29, 1908 (35 Stat. L., 444-450).

The two sections numbered 1 and 2 of the bill do not relate to sections 1 and 2 of the act of April 23, 1904, supra, which it is proposed to amend. It is suggested that possible confusion will be obviated by giving the two sections of the bill the next consecutive numbers of the original bill as amended by the act of March 3, 1909 (35 Stat. L., 795-796).

It is respectfully recommended, therefore, that the following changes be made in the bill:

In line 9, page 1, strike out the words "as follows" and insert in lieu thereof the words "by adding thereto the following sections."

Strike out the figure "1" in line 1, section 1, page 2, and insert in lieu thereof the figures "23."

Strike out the figure "2" in line 18, section 2, page 2, and insert in lieu thereof the figures "24."

In section 2, page 2, strike out all that part after the word "lands" in line 14, and insert in lieu thereof the following: ", after deducting the expenses of the survey and sale of the lands, shall be paid into the Treasury of the United States and expended as heretofore provided in section fourteen, as amended by the act of May twenty-ninth, nineteen hundred and eight."



The act of March 3, 1909, supra, authorized the Secretary of the Interior to reserve from location, entry, sale, or other appropriation all lands within the Flathead Reservation chiefly valuable for power or reservoir sites. There are about 144 Indian allotments within the areas withdrawn for power and reservoir sites. The department has been unable to procure the relinquishment of all of these allotments. No authority has been conferred on the department to compel the relinquishment of these allotments and it is not probable that the voluntary relinquishment of all the allottees can be procured before April 1, 1910, the date set by the President's proclamation for making entry of the surplus lands on this reservation. It is believed that the department should be authorized to reserve a sufficient quantity of the surplus lands to provide lieu allotments for those Indians who may hereafter relinquish their allotments within any of the power or reservoir sites referred to, by adding to Senate bill No. 3983, Sixty-first Congress, second session, the following:

"Section 25. That the Secretary of the Interior is hereby authorized to set aside and reserve so much of the surplus unallotted and otherwise unreserved lands of the Flathead Indian Reservation as may be necessary to provide an allotment to each Indian having an allotment on any of the lands set aside and reserved for power or reservoir sites, as authorized by section twenty-two of the act of March third, nineteen hundred and nine (Thirty-fifth Statutes at Large, page seven

hundred and ninety-six), who may relinquish his allotment within such power or reservoir site; and the"

The department will be glad to see the amendments suggested herein become a part of the law.

Very Respectfully,

R. A. BALLINGER, *Secretary.*

Hon. Moses E. Clapp,

*Chairman Committee on Indian Affairs,*

*United States Senate.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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**No. 76-185**

---

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION, *et al.*,
*Petitioners,*

v.

JAMES M. NAMEN, *et al.*, AND THE CITY OF POLSON, MONTANA,
*Respondents.*

---

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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## BRIEF FOR RESPONDENT-INTERVENOR IN OPPOSITION

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## BRIEF FOR RESPONDENT-INTERVENOR IN OPPOSITION

---

Respondent-Intervenor adopts, for the purpose of this Brief in Opposition, the material in the Petition under the headings of "OPINIONS BELOW" and "TREATIES AND STATUTES INVOLVED".

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition and the Respondent-Intervenor adopts the jurisdictional statement as contained in the Brief as its own.

## QUESTION PRESENTED

Whether property owners of Federally Patented fee simple land adjoining the high water mark of the South half of Flathead Lake were intended by Congress to have as an indicent of such ownership a Federal common law right of access and wharfage.

## STATEMENT OF THE CASE

In 1904, the United States Congress, [1] unilaterally, and without the consent of the Tribe, enacted legislation providing for the survey and allotment of lands under provisions of the General Allotment Act [2] of the United States and the sale and disposal of all of the remaining lands then embraced within the Flathead Indian Reservation.

In 1908, pursuant to the Act of April 23, 1904, supra, the United States allotted to Antoine Morais (Flathead Allottee No. 1378) a tract of land riparian to the South half of Flathead Lake. [3]

The South half of Flathead Lake, which is a navigable body of water, was included within the boundary of the original Flathead Indian Reservation. [4]

---

[1] Act of April 23, 1904, 33 Stat. 302.

[2] Act of 1887, 24 Stat. 388 as amended by Act of Feb. 28, 1891, 26 Stat. 794.

[3] Under the provision of the General Allotment Act, supra, the allottee was entitled to one-eighth section of land (80 acres). The record does not reflect why the allotment was diminished to 75.42 acres.

[4] Treaty of July 16, 1855, 12 Stat. 975



The Respondents are the owners in common through mesne conveyances of riparian portions of the Morais allotment. They operate a marina business upon these premises. As the proprietors of this business they have maintained and created certain buildings, docks, wharves and piers which extend beyond the high water mark and encroach on the beds and banks of Flathead Lake.

Flathead Lake was used extensively for commerical navigation from the years before 1900 into the 1920's. Large passenger and freight boats utilized its waters and the ports situate on the South half of the Lake.

By Act of June 21, 1906, 34 Stat. 325, 354, Congress amended the Act of 1904, supra so as to provide for the establishment of designated townsites at then existing settlements. Among these townsites was the City of Polson, Montana, located on Polson harbor on the South half of Flathead Lake. [5] Since its incorporation it has continuously maintained docks, wharves, piers and buildings below the high water mark and which encroach on the bed and banks of Flathead Lake. Under appropriate Montana Statutes it has, by annexation, included the lands of the Respondent Namens within its Corporate boundaries. It has, since before its incorporation, been recognized and established as a port and headquarters for navigation of the South half of the Lake. Additionally, it is the title owner through successive conveyances to the allotment of one Oscar Auld (Allottee No. 20624) which lands are riparian to the Lake. The Respondent City has developed a large recreational park upon the latter land for the benefit of the public. Included in the park facility is a large public dock used

---

[5] The City of Polson was on November 11, 1909, duly chartered and incorporated under Montana laws as a Municipal Corporation of the State of Montana. In 1923, it was designated as the County Seat of Lake County, Montana, by the Montana State Legislature. Sec. 16-224 R.C.M., 1947.

for swimming and boating. This dock, as the Namens', extends below the high water mark and encroaches on the bed and banks of Flathead Lake.

On August 6, 1973, the Petitioners filed an action in the United States District Court for the District of Montana seeking a judgment declaring that "the defendants' are in trespass upon plaintiffs' land to the extent that they maintain and have erected buildings and structures beyond the high water mark... of Flathead Lake and encroach on the bed and banks of said Lake." They ask the court to enjoin all further trespass and that "defendants be directed to immediately remove all buildings and structures, including landfills that extend beyond" the high water mark and that the lands below the high water mark "be restored to their original condition."

## REASONS IN OPPOSITION

### I.

The Petition of the Tribes should be considered only in light of the opinion on the "narrow" issue before the District Court. That determination was that the Federal common law concepts of riparian rights of access and wharfage apply to Federal grants of riparian lands on Indian Reservations despite the lack of any express Congressional language to that effect.

Since the inception of this action, the Petitioners have taken an inconsistent position. On the one hand they claim the benefit of the common law rule that the riparian owners to lands bordering navigable waters own only to the high water mark. Conversely, they reject the coextensive common law rule permitting riparian rights of access and dockage. Yet the former rule can only be



justified and explained upon the grounds that the latter is applicable. [6]

Significantly, at no point in the proceedings in the court of first impression did the Respondents indicate that the intent of the lawsuit was to establish ownership and by lease and regulations to ensure that the Tribes are compensated fairly for the use of their property. [7]

The District Court record was not sufficiently developed and does not include evidence and materials to enable this Court to consider issues which were first raised on appeal. [8]

Counsel for Petitioners are highly skilled and acknowledged as specialists in the Indian claims field. The Petition is replete with such phrases as "The integrity of this rule is now challenged"; "the court below violated this eminently sound and vital canon"; "Balancing of 'equities' between Indians and non-Indians cannot be permitted to stand"; and "erroneous assumptions".

Yet this Petition does not present to this Court one new argument. Nor does it offer any alternative constructions of the Treaty, statutes, cases, and surrounding circumstances which the court below in its well reasoned opinion was called upon to construe.

---

[6] "The general rule, of course, is that patents of the United States to lands bordering navigable waters, in absence of special circumstances, convey only to high water mark. The rule has its roots in the principle of the common law that ownership of the shore, comprising the area between high and low water should be in the sovereign in trust for the general weal." *Montana Power v. Rochester*, 127 F.2d, 189, 192 (9th Cir. 1942).

[7] Tribes Petition, p4, Footnote 8.

[8] For example, under the existing *Tribal Constitution, adopted and approved on Oct. 28, 1935*, by then Secretary of Interior Harold L. Ickes, the Tribal Council is restricted in leasing Tribal lands to a nonmember unless it shall appear that no Indian cooperative or individual member is able and willing to use the land and pay a reasonable fee for such use.

Quite simply, the position of the Petitioners is that, despite the exhaustive and voluminous briefs submitted by all parties, and despite the incisive analysis and inquiry into each of the relevant elements, the courts below inaccurately ascertained the intent of Congress.

It is to this position that Intervenor would address the remainder of its arguments.

**II.**

This Court in *DeCoteau v. District County Court,* 95 S.Ct. 1082 (1975), pronounced the standards which are applicable to the case at bar:

> "We are aware of course, that much modern thinking respecting the culture and welfare of the Indians is at marked variance with that of the period we now survey, that around the turn of the century. But we do not sit to rewrite the legislation of decades past. We do look to the Congressional intent when it was written viewing the totality of the circumstances from the record of its entirety..."

The cited decision is subsequent to the lower court's opinion which adopted the following criteria as its guidelines citing *Stevens v. C.I.R.,* 452 F.2d, 741, 744 (9th Cir. 1971):

> "Federal policy toward particular Indian Tribes is often manifested through a combination of general laws, specific acts, treaties, and executive orders. All must be considered in pari materia in ascertaining congressional intent. *Kirkwood v. Arenas,* 9th Cir. 1957, 243 F.2d, 863, 867."

In arriving at its opinion the court applied the more stringent standard in an incisive analysis of the two relevant Treaties; the effect of the Allotment Acts and other Congressional Enactments; the applicability of Federal common law rules; applicability of Tribal law;



Federal recognition of Tribal jurisdiction; the effect of status of Indian trust land; and the failure of Congress to expressly grant riparian rights.

In each of the above areas of discussion the court below referenced supportive documents and case authority as it methodically sustained or rejected the contentions and theories of law advanced in the submitted briefs.

In conclusion, the court adopted two firmly established principles of relevant case law:

> "(1) In all other situations in which the Federal Government holds title to the beds and banks of navigable waters, a fee patent issued by the United States to riparian lands would include the rights of access and wharfage without an express provision in the patent.
>
> (2) Where the United States holds title in trust for Indian Tribes, federal common law is applicable to a determination of the extent of a federal grant despite the lack of any express Congressional language to that effect."

Given these principles it arrived at the inescapable conclusion that when the provisions for the issuance of fee patents were written into the Act of April 23, 1904, it was the clear intent of Congress that these patents would have the same incidents of ownership that all other Federal patents to riparian lands would enjoy.

**III.**

Contrary to the position of the Petitioners, the Tribal fishing right is left unimpaired. The Petitioners obfuscate or ignore the "narrow" issue here involved. Intervenor has no quarrel with the principle pronounced in the case of *United States v. Winans,* 198 U.S. 371 (1905), T.P., p13.

This rule of law would permit the Tribes a right of access to exercise their reserved fishing right which would be impressed upon the riparian right to access and wharfage.

Therefore, Petitioners' assertion that the Tribes could be excluded from the lands to prevent them guaranteed Treaty fishing rights has no merit. The latter would be fully protected under the holding of *Winans, supra.*

The contention of the Petitioners that the opinion will impair the exclusive fishing rights guaranteed by the Treaty in ways other than exclusion from the lands ignores the distinction between the ownership of interests in land and the ownership of a private right such as the Indian right of exclusive fishing.

To demonstrate this distinction requires a review of the controling case law.

The title which the United States holds to lands under the navigable waters is a title held in trust for the people of the future state. The soil under navigable waters was not granted by the Constitution to the United States, but was reserved to the states, respectively. The new states have the same rights, jurisdiction, and sovereignty over the soil under navigable water as the original states, except as may be limited by express statute in the Enabling Act. See *Pollard v. Hagen,* 44 U.S. 212 (1945).

In *United States v. Holt State Bank,* 270 U.S. 49, (1925), this Court further articulated the principle as it applies to Indian Reservations:

> "It is settled law in this country that lands underlying navigable waters within a state belong to a state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, and subject to the



> qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly. Barney v. Keskuh, 94 U.S. 324, 338; Shively v. Bowley, 152 U.S. 1, 47-48, 57-58; Scott v. Lattig, 227 U.S. 229, 242; Port of Seattle v. Oregon & Washington R.R. Co., 225 U.S. 56, 63; Brewer-Elliott Oil and Gas Co. v. U.S., 260 U.S. 77, 83-85. But as was pointed out in Shively v. Bowley, pp.49, 57-58, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances where impelled to particular disposal by some international duty or public exigency."
>
> "It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." [9]

[9] In *Holt,* the Court reasoned because there was no attempted exclusion of others from the use of navigable waters, that the public right was not disposed of. Here there is no attempt to exclude from the waters, but, contra, in the Treaty of the Upper Missouri, an affirmative guarantee to citizens to use the navigable waters.

In the Hellgate Treaty, *supra,* the exclusive right of taking fish in "all streams running through or bordering said reservation" is further secured to the Indians. However, this right clearly is not applicable to just the Reservation area, but could be interpreted to include the North half of Flathead Lake, in that the latter "stream" borders the Reservation. [10] Therefore, it appears that the latter is a private right granted the Indians, which right has nothing to do with the ownership of the bed of the navigable lake. [11] Nothing can be inferred from this grant to support the disposal of the public's paramount rights to the navigable waters.

The distinction between ownership for navigation purposes and a license of a private right for fishing purposes is clearly shown in the Solicitor General's opinion considering the effects of the ruling in *Holt, supra,* on the fishing rights of the Chippewa Tribes on the Red Lake Reservation as follows:

> "I am mindful of the statement of the Supreme Court of the United States v. Holt Bank, supra, that while Indians of the Red Lake Reservation were to have access to the navigable waters therein and were to be entitled to use them in accustomed ways, 'these were common rights vouchsafed to all, whether Indian or white,' but when this statement is read, as it should be, in the light of the decisions cited in its support, it becomes apparent that the Court had in mind rights of navigation of a public nature and not private rights of ownership such as the Indian right of fishing." Opinion M28107, June 30, 1936,

[10] See *U.S. v. Pollman,* 364 F.Supp. 995 (1973).

[11] "The fact that navigable waters are a part of the reservation held in trust for the Indian fisheries does not conflict with the trust also to hold them for the public for navigation." *Moore v. U.S.,* 157 F.2d, 760, 765.



> as quoted in *Federal Indian Law,* 1958, Ed. at p496-498.

Article III of the Hellgate Treaty, supra, recognized the public's rights in the Reservation lands as follows:

> "And provided, that if necessary for the public convenience roads may be run through the said reservation; and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them; as also the right in common with citizens of the United States to travel upon all public highways."

While the public roads visualized by the Treaty were doubtless construed to mean land wagon roads, the word cannot be so strictly construed that it would not include ferries over navigable rivers or roads necessary for portage between navigable waters. Moreover, "public roads" running through the Reservation must be considered as an exception to the exclusive use and benefit of the Treaty.

Any ambiguities contained in the Hellgate Treaty concerning the Federal Government's reservation of its right to control the navigable waters of Flathead Lake are conclusively resolved in the subsequent Treaty of the Upper Missouri of Oct. 17, 1855, 11 Stat. 657:

> "For the purposes of establishing thoroughfares through their country... the United States may... permanently occupy as much land as may be necessary. . . . and . . . the navigation of all lakes and streams shall be forever free to citizens of the United States."

Thus, it is concluded that nothing contained in either Treaty was intended to grant away the general public's right in these navigable waters. On the contrary, these rights were expressly reserved.

## IV.

The decision below does not constitute a significant precedent which, if uncorrected by this Court, will stand for the granting away of Tribal trust property and the impairment of Indian Treaty rights by implication. T.P. p6.

Contrary to the Petition of Petitioners, the opinion has nothing to do with a present granting away of Tribal trust property, or a present impairment of Indian Treaty rights. Insofar as the Flathead Reservation is concerned, the decision simply maintains the status quo. This decision merely will result in permitting the some 1600 existing riparian land owners to continue to maintain their docks and access to the navigable channels of Flathead Lake.

The Petitioners either confuse or misapprehend the relevant issue and question. As was stated by the District Court, T.P. p21a, Footnote 15, "Plaintiffs agree the United States has a power paramount to that of the Tribes over Tribal lands and waters and the United States, by clear Act of Congress, can exercise that power to the derogation of the Tribal power." Once that paramount power had been exercised by Congress in abrogating the Treaty by carving out individual land ownerships from the Tribal communal property, then the issue no longer was whether the Treaty had been abrogated, but rather, to what extent.

Congress clearly defined the extent by the Act of May 29, 1908, 35 Stat. 444. Congress provided that alloted lands "which can be sold under existing law... may be sold on the petition of the Allottee," and "that upon approval of any sale hereunder by the Secretary of Interior he shall cause a patent in fee to issue in the name of the purchaser for the lands so sold..."



The Federal patent is a United States grant, not a Tribal grant. Any suggestion to the prospective patentee that it carried fewer incidents of ownership, by reason of it being on a Tribal Reservation, would have frustrated the intent of the Congressional purpose of the Act.

Thus, the Treaty had been abrogated to the extent that the patent diminished the Tribal estate. The patent diminished the Tribal estate to the extent that it carried the same incidents of ownership as a Federal patent granting riparian land in Washington, D.C., New York State, or California. The latter would have had the Federal common law right of access and wharfage. A fortiori, the Federal patent to the lands here involved should enjoy the same Federal common law right.

As to other Reservations, each enjoys the benefits of one of the most fundamental principles of Federal Indian Law which, simply stated, provides that separate Treaties and agreements with separate Tribes must be separately construed. Under the guidance of *DeCoteau, supra,* the language, legislative history and surrounding circumstances of each Act will continue to be the controlling factor.

## CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF
and
## BRIEF *AMICUS CURIAE* OF MONTANA INTER-TRIBAL POLICY BOARD

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ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

The Montana Inter-Tribal Policy Board moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. The written consent of the petitioner is annexed. The consent of the respondents was not secured. The respondents have until October 6, 1976, within which to file their brief in opposition and accordingly will have

ample time to comment upon this brief, should they deem it appropriate.

## INTEREST OF AMICUS CURIAE

The Montana Inter-Tribal Policy Board is a voluntary organization composed of the seven Indian tribes in Montana, each with a reservation—the Assiniboine and Sioux Tribes (Fort Peck Reservation), the Crow Tribe, the Confederated Salish and Kootenai Tribes (Flathead Reservation), the Northern Cheyenne Tribe, the Blackfeet Tribe, the Rocky Boy Tribe and the Gros Ventre and Assiniboine Tribes (Fort Belknap Reservation). The Inter-Tribal Policy Board was organized to protect and promote the interests of the Indians of Montana. The United States has guaranteed to each tribe, by treaty and statute, rights in property that are inalienable without the consent of Congress (25 U.S.C. 177). The approach of the courts below opens the way to negate the statutory protection and places tribal rights in jeopardy whenever a conflict arises between the non-Indian claimant of tribal land and a tribe.

Respectfully submitted,

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*Attorney for the Montana Inter-Tribal Policy Board.*

September 1976

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## BRIEF *AMICUS CURIAE* OF MONTANA INTER-TRIBAL POLICY BOARD

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Indian tribes understand that land forming the beds of navigable waters on Indian reservations established before a State was admitted into the Union is the property of the tribes. That property is inalienable without the consent of Congress (25 U.S.C. 177).

The reason for making tribal property inalienable was explained in *Leavenworth, Etc. R.R. Co. v. United*

*States*, 92 U.S. 733, 742 (1876) where the Court stated:

> "* * * Unless the Indians were deprived of the power of alienation, it is easy to see that they could not peaceably enjoy their possessions with a superior race constantly encroaching on their frontier, with the ultimate fee vested in the United States coupled with the sole right to buy that right, in case the Indians were willing to sell, they were safe against intrusion if the Government discharged its duty to a dependent people. * * *"

The courts below construed the controlling treaty and statutes to bypass the absolute protection of Section 177. The courts adjudicated title in the nonIndians out of concern that otherwise a "grievous injustice" would be done to the people who had used tribal property over a long period of time. (Pet. App. 3a, 28a-29a.)

The question before the courts was one of title. The answer turned on the meaning of treaty and statutory language. This brought into play the principle that Indian treaties and statutes are to be liberally construed with doubts and ambiguities resolved in favor of the tribes. This Court termed that principle an "eminently sound and vital canon." *Northern Cheyenne Tribe v. Hollowbreast*, ____ U.S. ____, 48 L.ed.2d 274, 280, n. 7 (1976). Recently the circuit court emphasized that the rule is not a mere canon of statutory construction "easily invoked and as easily disregarded. It is an interpretive device, early framed by John Marshall's legal conscience for ensuring the discharge of the Nation's obligations to the conquered Indian tribes." *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (C.A. 9, 1975).



The decision below does not rest on an application of that principle, but rather on the feeling that a ruling in favor of the tribe would result in a "grievous injustice." If the degree of "injustice" is to control, the tribe should have prevailed. He who claims tribal property, loses nothing when the true owner is recognized. He cannot lose what he did not own. The injustice is to the tribes if the nonIndian is awarded tribal land because he used it for so many years.

Indian tribes rely, as they have a right to rely, on the protection afforded by 25 U.S.C. 177, the immunity from the bar of limitations, laches and estoppel, and on the well established canons governing the construction of Indian statutes. All these safeguards are designed to underwrite the promise of the United States to carry out its treaty obligations.

Now that tribes are finally being afforded the opportunity to exercise self-determination and to use their own property, they are confronted with a judicial approach that measures the right to tribal land by the subjective test of injustice to the nonIndians who may have used the tribal land for many years. The lower courts must be reminded of their obligation to follow the mandates provided for the protection of Indian tribes. Otherwise, the treaties, the statutory prohibition against alienation and the high sounding canons of judicial construction, are without life.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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*Attorney for the Montana Inter-Tribal Policy Board.*

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-185

**CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION**

*et. al., Petitioners*

*v.*

**JAMES M. NAMEN, et al., AND THE CITY OF POLSON, MONTANA,**

*Respondents*

## MOTION OF THE LUMMI INDIAN TRIBE AND THE QUINAULT INDIAN NATION FOR LEAVE TO FILE STATEMENT AMICI IN SUPPORT OF PETITION OF CONFEDERATED SALISH AND KOOTENAI TRIBES FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

AND

## STATEMENT OF THE LUMMI INDIAN TRIBE AND THE QUINAULT INDIAN NATION IN SUPPORT OF PETITION OF CONFEDERATED SALISH AND KOOTENAI TRIBES FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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## MOTION

The Lummi Indian Tribe and the Quinault Indian Nation, both of the State of Washington, move this Court for leave to participate as amici curiae in support of the Petition for Certiorari. Counsel for amici have consulted with counsel for the Confederated Tribes of the Colville Reservation so as not to duplicate argument. The decision below seriously threatens the reserved Treaty rights of amici in the exclusive use and occupation of their tribal trust lands.

## STATEMENT OF INTEREST OF AMICI

### Identification of Amici

The Lummi Indian Tribe is the government of the Lummi Indian Reservation located in Whatcom County, Washington, and governs pursuant to a Constitution and Bylaws approved by the Secretary of the Interior. The Lummi Reservation includes approximately 12,500 acres, of which some 7,900 acres are still held by the United States in trust for the Lummi Tribe and individual Indians. The Reservation was entirely allotted pursuant to the Treaty of Point Elliott, 12 Stat. 927.

The Quinault Indian Nation is the government of the Quinault Indian Reservation located in Grays Harbor and Jefferson Counties, Washington, and governs pursuant to Bylaws originally adopted in 1922. The Quinault Reservation includes approximately 150,000 acres still held in trust by the United States for the Quinault Nation and individual Indians. The Reservation was entirely allotted pursuant to the Treaty with the Quinault, 12 Stat. 971.

The Point Elliott and Quinault Treaties, like the Hell-Gate Treaty with the Petitioner Tribes, are all treaties negotiated and drafted by Colonel Isaac Stevens, and are all substantially similar.

The Lummi Reservation includes some 5,000 acres of tribally owned tidelands, bordered by some 30,350 front feet (775 acres) of mostly non-Indian owned shoreline. The tidelands support an active oyster farm and fish rearing facility which is supported by several million dollars of Federal funds.

Two navigable rivers whose banks are owned partially in trust and partially in fee flow through the Lummi Reservation.

The Quinault Reservation includes the entirety of Lake Quinault, some 10,000 acres, and portions of four possibly navigable rivers. The Quinault Nation operates a dock and fish rearing facility upon the lake, together with a laboratory and research station on trust land riparian to the lake. For many years the Quinault Nation has regulated and licensed all fishing, boating and wharfage on Lake Quinault even though such activity orginiates on lakeshore property outside the Reservation. The Quinault Nation has regulated fishing in the rivers and estuaries of the reservation from pre-white contact times.



## ARGUMENTS OF AMICI

Amici here raise two issues not discussed in either the Petition or the Motion of the Colville Tribes: (1) the exclusive use and occupation of the reservation reserved by amici in the Point Elliott and Quinault Treaties and (2) the increased litigation which will arise as the Indian Tribes on the over 150 reservations within the jurisdiction of the Ninth Circuit attempt to distinguish the factual situation on their reservations from the facts of this case.

### The Decision Below Threatens Reserved Treaty Rights to Indian Trust Lands

1. Treaties with the Indian Tribes are to be considered abrogated only in the face of explicit language in Congressional enactments. Menominee Tribe v. United States, 391 U.S. 404 (1968). Amici, in Article II of the Point Elliott Treaty, and Article II of the Quinault Treaty, reserved the exclusive use of their reservation to signatory tribes, as did Petitioner Tribes in Article II of the Hell-Gate Treaty. The court below recognized that neither the Hell-Gate Treaty nor the General Allotment Act, 24 Stat. 388, 25 U.S.C. §§331 et seq., included the grant of riparian rights on reservation waters to any non-Indian, but went on to hold that such riparian rights as wharfage (and presumably piscary) were implied by Federal common law together with the later advertising of the Department of the Interior in its sales of surplus lands on the Flathead Reservation. Neither the Court of Appeals nor the Trial Court considered the status of the Reservation as lands reserved by the tribes for their exclusive use and occupation. See United States v. Winans, 198 U.S. 371 (1905). The reservation of exclusive

use and occupation includes the right of a tribe to impose terms upon which permission to enter or reside may be granted, including licensing and taxation. Morris v. Hitchcock, 194 U.S. 384 (1903).

The exclusivity of use and occupancy of Indian reservations, although to some extent modified by modern circumstances, was nonetheless upheld last year by the Ninth Circuit. United States v. Washington, 520 F. 2d 676 (1975), cert. den. -U.S. --46 L. Ed. 2d 269 (1976). Therein, the court confirmed that an exclusive right of fishing within the reservation was reserved by the Treaty Tribes (not by or for individuals or their successors) and had been explicitly bargained for and reserved in the Point Elliott and Quinault Treaties. The decision of the Ninth Circuit in the present case would abrogate identical treaty provisions by implying that a non-Indian riparian owner of reservation shorelands has wharfage rights allowing conversion of the tribally reserved lake to his own exclusive use. Implementation of the decision would allow non-Indian shoreline owners to circumvent the rights reserved in the Treaties and exclude amici from tribal lands and waters which the Indian Tribes and the United State agreed were to be retained exclusively by the Tribes.

The Decision Below Will Lead to Increased Litigation

2. The Ninth Circuit's use of a balancing-of-the-equities test, recently rejected by this Court in Cappaert v. United States, -U.S.-, 48 L. Ed. 2d 523 (1976), opens the door to a deluge of suits as tribes and non-Indians attempt to clarify rights upon each reservation. The balancing test requires careful examination of the facts of each case. These facts include not only the relevant treaties, statutes, executive order, allotment acts, and advertisements of the developer, whether Federal or private, but also the length of time which the non-Indian development has encroached. This will inevitably lead to litigation invloving every body of water on every reservation within the United States. Were this not sufficient to clog the court calendars, each body of water might well engender multiple actions. For example, the shores of Lake Quinault include land of four different characters: homestead land; land privately owned through homestead within the Olympic National Park[1]; allienated and trust allotments; and homestead land now within the Olympic National Forest.



Because the United States holds legal title to tribal lands and waters, United States Attorneys can expect a series of requests from tribes seeking to protect their rights by bringing suit to distinguish the decision below from the situation on their own reservation. The result might not only be separate suits brought by the tribes and the United States,[2] but also adjudications in actions brought solely by tribes which do not result in a final decision: the government is not bound unless it is a party, Skokomish Tribe v. France, 269 F. 2d 555 (9th Cir. 1959), and it cannot be involuntarily joined as a party. 28 U.S.C. § 2409 (a).

1. Or the Quinault Reservation. The Quinaeilt Indians, 102 Ct.Cl. 882 (1945).

2. See 25 U.S.C. § 175, and 28 U.S.C. § 1362.

CONCLUSION

For the foregoing reasons, amici urge that the Petition for Certiorari should be granted.

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September 23, 1976

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-185

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION, et al.,
*Petitioners,*

v.

JAMES M. NAMEN, et al., AND THE CITY OF POLSON, MONTANA,
*Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

# BRIEF FOR AMICUS CURIAE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION

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**IN THE**

# Supreme Court of the United States

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**No. 76-185**

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CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION, et al.,
*Petitioners,*

v.

JAMES M. NAMEN, et al., AND THE CITY OF POLSON, MONTANA,
*Respondents.*

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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# BRIEF FOR AMICUS CURIAE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION

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## INTEREST OF AMICUS CURIAE

This brief is filed with the consent of all parties.

Amicus is a federally recognized Indian tribe occupying a reservation which encompasses 1.3 million acres in the eastern portion of the State of Washington. The reservation was established by President Grant in the Executive Order of July 2, 1872 (1 Kappler 916), and is governed by the Colville Business Council under the Constitution and By-Laws approved February 26, 1938.

Like the Petitioners, the Colville Confederated Tribes comprise a number of separate tribes who formerly occupied a vast area in the State until they gave up their original homelands to be moved onto a reservation. That reservation was later diminished to its present size. *See, Antoine v. State of Washington,* 420 U.S. 194 (1975).

Included within the exterior boundaries of the Colville Indian Reservation are a number of bodies of water, including streams, rivers, lakes, and, in particular, half of the Columbia River as it borders the Reservation.

There are approximately 200,000 acres of fee patent land on the Reservation, much of which is adjacent to the waters of the Reservation.

The Tribes utilize the waters of the Reservation for economic development, the production of fish, and for tribally regulated and licensed fishing and boating.

Amicus is concerned that, if the decision of the Ninth Circuit Court of Appeals is allowed to stand, it will find that waters heretofore used and regulated by its governing body will be subject to unregulated use by non-Indians, never contemplated by the Tribes or their members.

## QUESTION PRESENTED

Whether reservation lands held in trust by the United States for an Indian tribe can be used by a non-Indian for wharves, docks, breakwaters, and other structures without the consent of the tribe or the Secretary of the Interior and without express congressional authorization.



## STATEMENT OF THE CASE

Amicus hereby adopts the statement as set forth in the Petition.

## REASONS FOR GRANTING THE WRIT

### I. The Ruling of the Ninth Circuit Court of Appeals Has Far-Reaching Effects on Indian Property Rights Throughout the Country

In a novel and unprecedented decision, the Ninth Circuit Court of Appeals for the first time has held in this case that a non-Indian property owner, whose land abuts tribal waters, may interfere with the tribe's use of its waters and, in fact, build a physical structure directly on tribally owned beds and waters.

The Ninth Circuit has done this without regard to the traditional canons of Indian law with respect to Indian water rights and the control of tribal property.

It must be remembered that this decision may not be limited to the facts of the instant case, but may have far-reaching effects on almost every Indian reservation. Amicus, like other Indian tribes, has relied on the established principle that non-Indian fee patent landowners within reservation boundaries do not receive riparian rights with the purchase of their lands. Such reliance has resulted in tribal economic development projects using waters and the beds of waters held by the United States for the tribes, and tribal fishing and recreation programs designed for the benefit of tribal members.

The extension of doctrines of riparian rights to reservation waters would be a major change in the view of the tribes and the United States as to the ownership and control of those waters.

In addition, the principle of the balancing of "equities" suggested by the court below was rejected recently in *Cappaert v. United States,* 48 L.Ed.2d 523, 534 (1976). The effect of the adoption of such a rule in this case clearly shows the significant impact of such a judicial aberration.

## II. The Ruling of the Court Below Stands in Clear Opposition to Current Congressional and Judicial Policies

The opinion of the court below shows a complete disregard for the policies determined by Congress and given effect by the courts within the last decade. The Ninth Circuit attempts to distinguish the recent series of Supreme Court and courts of appeals decisions in favor of tribal regulation and control of their own reservations by stating that such cases did not deal with riparian rights and, therefore, were inapplicable. This offhand rejection of congressional policies, as well as the decisions of this Court, cannot stand.

In the Indian Self-Determination and Education Assistance Act of 1975 (Public Law 93-638), Congress provided for greater participation of Indian tribes in programs and services theretofore conducted by the federal government and, in doing so, found:

> (2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

Congress went on to declare its policy to establish a

> . . . meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people



> in the planning, conduct, and the administration of those programs and services.

Similarly, in *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 172 (1973), this Court stated that the doctrine of tribal sovereignty provided the "backdrop" against which all federal Indian legislation must be interpreted. Despite the attempt by the court below to distinguish this case as a "tax case", there is no indication that this statement of policy was not meant by this Court to apply to all statutes affecting Indian rights and status.

Likewise, in *United States v. Mazurie,* 419 U.S. 544, 557 (1975), which considered whether Congress could delegate its legislative power over non-Indians on fee patent land to an Indian tribe, the Court stated:

> Thus, it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members *and their territory.* [Emphasis added].

In *Williams v. Lee,* 358 U.S. 218, 223 (1959), this Court noted, in holding that the Navajo Tribe had jurisdiction over matters on the reservation, that:

> The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

The Ninth Circuit upheld the jurisdiction of Indian tribes over non-Indians committing acts within the exterior boundaries of an Indian reservation in its recent decision in *Oliphant v. Schlie,* ..... F.2d ....., No. 74-2154 (9th Cir., August 24, 1976). The Ninth Circuit restated the rule that Indian tribes retain whatever original sovereign powers they had unless those powers were specifically limited by acts of Congress.

Finally, in *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 48 L.Ed.2d 96 (1976), this Court rejected the notion that the fee patent status of allotted land is a basis for establishing by implication any difference in jurisdiction over the property. This Court in that case noted that the policy of allotment was repudiated by the Indian Reorganization Act of 1934, 48 Stat. 984, and that any analysis of the effect of allotment must be viewed in light of this repudiation.

The decision below in this case would make the right of the tribe to control the shoreline and waters of its lake property dependent upon the status of the ownership of the uplands, thus resulting in the "impractical pattern of checkerboard jurisdiction" rejected by this Court in *Moe, supra.*

Thus, the most recent pronouncements of congressional policy and judicial interpretations fully support the right of Indian tribes to regulate and control personal and property matters within the exterior boundaries of their reservations. The opinion of the court below denying such a right must therefore be seen as violative of this policy and should be reversed.

### III. The Decision Below Misinterprets the Trust Relationship of Indian Tribes and the United States Government in Denying the Applicability of Tribal Law to the Use of Tribal Property

In an unsupported analysis of what law should apply to determine the riparian rights of the lands in question, the court below rejected the argument that, like a state upon admission to the Union, a tribe has full jurisdiction over control of the bed and banks of the lake. The court held that the tribe was not in the same position as a state, but



was like a territory since the United States was holding the lands and waters in trust for the tribe. The court found that the tribe has a less valuable form of ownership of the bed and banks of its navigable waters than a state would have because legal title is held by the United States.

This decision departs radically from accepted principles of Indian law. Unlike both states and territories, the original ownership of all of the lands and waters involved was exclusively in the tribe. Upon the creation of the trust relationship between Indian tribes and the United States Government, the tribe granted to the United States naked legal title for the purposes of administering the property and protecting the Indian wards. Thus, the grant of property was not one *from* the United States to the tribes, but rather a reservation of ownership rights by the tribe with legal title being given to the United States solely for the purpose of its exercising its role as guardian.

Both the United States and Indian tribes have always regarded the holding of Indian property in trust for tribes and their members as a superior form of ownership of property because it protected such property from being depleted. It must be remembered that the trust relationship between the United States and Indian tribes is a unique one which exists no where else in the law. To liken the United States Government's ownership of legal title of Indian lands in its role as trustee to its proprietary ownership of its own federal lands, thus resulting in the application of federal, and not tribal, law in this case "would not be an exercise of guardianship, but an act of confiscation." *United States v. Creek Nation*, 295 U.S. 103, 110 (1935).

Under the law of the State of Washington, the upland owner in a situation such as the instant case does not have a riparian right of wharfage or dockage. However, under the doctrine enunciated by the court below, a non-Indian owner of uplands on a body of Colville tribal water would

get that right. This would result in an encumbrance on tribal waters and on the United States' trusteeship that would not have occurred had the tribe not requested that the United States exercise protective control of the tribal property. Such a situation surely was not in the contemplation of the United States or the Indian tribes.

## CONCLUSION

The arguments presented by Petitioners, as well as the additional arguments presented by Amicus, compel review of the decision of the Ninth Circuit Court of Appeals by this Court. To allow the decision below to stand would be to sanction an unprecedented derogation of the trust responsibility exercised by the United States for the benefit of Indian tribes. Such a decision will have far-reaching deleterious effects on the remaining areas of Indian tribal property throughout this country. The decision below is at odds with the Indian policies of the United States Government, as well as the most recent court decisions regarding these matters.

For these reasons, this Court should grant the Petition for a Writ of Certiorari and reverse the decision of the Ninth Circuit Court of Appeals and should hold that reservation lands held in trust by the United States for an Indian tribe are not subject to rights of a non-Indian to build structures without the consent of the tribe and without express congressional authorization.

DATED this 16th day of September, 1976.

Respectfully submitted,

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ERNSTOFF & CHESTNUT
By Barry D. Ernstoff
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No. 76-185

# In the Supreme Court of the United States

OCTOBER TERM, 1976

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION, ET AL., PETITIONERS

*v.*

JAMES M. NAMEN, ET AL., AND THE CITY OF POLSON, MONTANA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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# In the Supreme Court of the United States

OCTOBER TERM, 1976

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No. 76-185

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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The Solicitor General, on behalf of the United States, submits this memorandum in support of the petition for a writ of certiorari.

This case presents the question whether non-Indians who own land abutting navigable waters within an Indian Reservation are entitled, without the Tribe's permission, to erect structures on the adjacent bed and banks, the title to which is held in trust by the United States for the Tribe's benefit.

Within the Flathead Indian Reservation,[1] Montana, lies the southern half of Flathead Lake, a navigable body of water whose bed and banks are held in trust by the United States for the Confederated Salish and Kootenai Tribes.[2] Responents Namen, who are non-Indians, own lakefront land within the Reservation through successive conveyances of portions of an Indian allotment issued in 1908 pursuant to the Act of April 23, 1904, 33 Stat. 302. One respondent, James Namen, operates on the lake a business known as Jim's Marina. He has erected and maintained certain structures that extend beyond the high-water mark of the lake and encroach on its beds and banks, including a breakwater[3] built in 1973 over the objections of officials of the Department of the Interior and the Tribes.

On August 6, 1973, the Tribes sued for declaratory and injunctive relief against respondents on the grounds that, as the beneficial owners of the bed and banks of the lake below its high-water mark, the Tribes had the right to control the use of that land, and that respondents were trespassing on tribal land.

The district court granted partial summary judgment against the Tribes, holding that respondents "as owners of land riparian to the south half of Flathead Lake are entitled as a matter of law to access to the

[1] The Reservation was created pursuant to the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975.

[2] The Tribes are organized pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 461 *et seq.* and have a governing body recognized by the Secretary of the Interior.

[3] Among the other structures are docks, wharves, piers and a storage shed (Pet. App. 8a).



lake" and that "[c]oncomitant with the right of access is the right to wharf out to navigable water" (Pet. App. 29a).[4] The court of appeals affirmed *per curiam* on the basis of the district court's opinion (Pet. App. 1a–3a).

1. The issue is important and warrants review by this Court. The decisions below not only will upset the delicate balance between Indian tribes and non-Indian riparian property owners on reservations in the Ninth Circuit but will doubtless affect such relationships within other reservations. The decisions also implicate the responsibility of the United States, which holds title to the bed and banks of many navigable waters within Indian reservations. Although the issue here is novel and no conflict exists among the courts of appeals, prompt resolution by this Court is important: settled rules should govern the interests of non-Indian property owners and Indian tribes so that legal uncertainty and continuing conflict between the parties can be avoided.

2. The decision imposes an important limitation on the right of Indians to exercise dominion over their reservations.

The district court held that through the Allotment Act of 1904, read in the context of federal common law, Congress conferred riparian rights of wharfage and access on the Indian allottees and their successors. Noting that "the authority of the Federal Government is superior to that of the Tribe" (Pet. App. 21a), the

[4] The court ordered a further hearing to determine whether any of the structures owned and maintained by respondents "constitute an abuse of their riparian rights" (Pet. App. 29a).

court rejected the argument that tribal law governed ownership, use and control of the bed (Pet. App. 19a–21a). The decision of the district court thus not only conferred certain riparian rights on the non-Indian landowners but also denied to the Tribes the necessary authority to regulate the exercise of those rights. Without that authority the Tribes will have no voice in determining such important matters as the proper dimensions and design of wharves and docks; the number of such structures consistent with safety or preservation of the beauty or ecology of the waters; or the types of other facilities that should be allowed. The only check upon the usage of Flathead Lake by private riparian landowners will be possible review by a federal court to determine whether the landowners have "abused" their riparian rights.

By contrast, a State has broad power to govern the use of beds and banks of navigable waters within its jurisdiction. *Pollard* v. *Hagan,* 3 How. 212; *Shively* v. *Bowlby,* 152 U.S. 1; *Illinois Central R.R. Co.* v. *Illinois,* 146 U.S. 387. Whether it acts as proprietor or sovereign, a State may limit private usage of lake beds and banks for the public benefit. *Port of Seattle* v. *Oregon & W. R.R.,* 255 U.S. 56. Even a federal patent does not confer private rights in those lands committed to state control. *Pollard* v. *Hagan, supra; Borax Consolidated, Ltd.* v. *City of Los Angeles,* 296 U.S. 10.

An Indian tribe, acting in its capacity as proprietor and sovereign, should have comparable authority with respect to non-Indian use of the lake beds and banks



that comprise part of the land of the reservation held in trust for the tribe. This Court has recently stated: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester* v. *Georgia,* 6 Pet. 515, 557 (1832); they are 'a separate people' possessing 'the power of regulating their internal and social relations . . .' [citations omitted]," *United States* v. *Mazurie,* 419 U.S. 544, 557. Yet the decisions below necessarily mean that the Tribes have no control over non-Indian usage of submerged tribal land abutting private land within their reservation. Such intent should not be attributed to Congress without far clearer evidence than exists on the record of this case.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1976.

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